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No. 555

In the Supreme Court of the United States

OCTOBER TERM, 1930

GEORGIA PUBLIC SERVICE COMMISSION ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA ET AL., APPELLEES

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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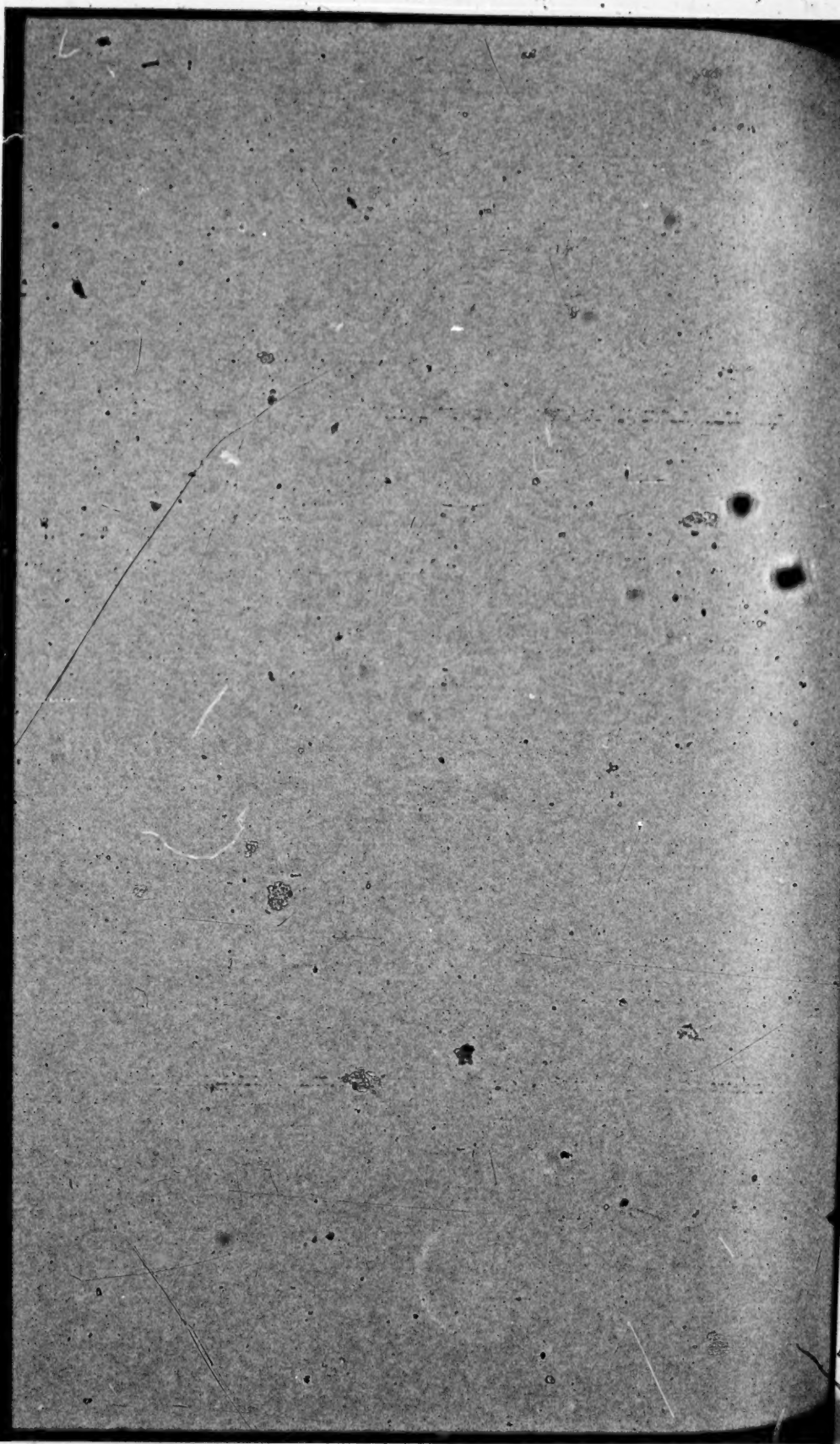

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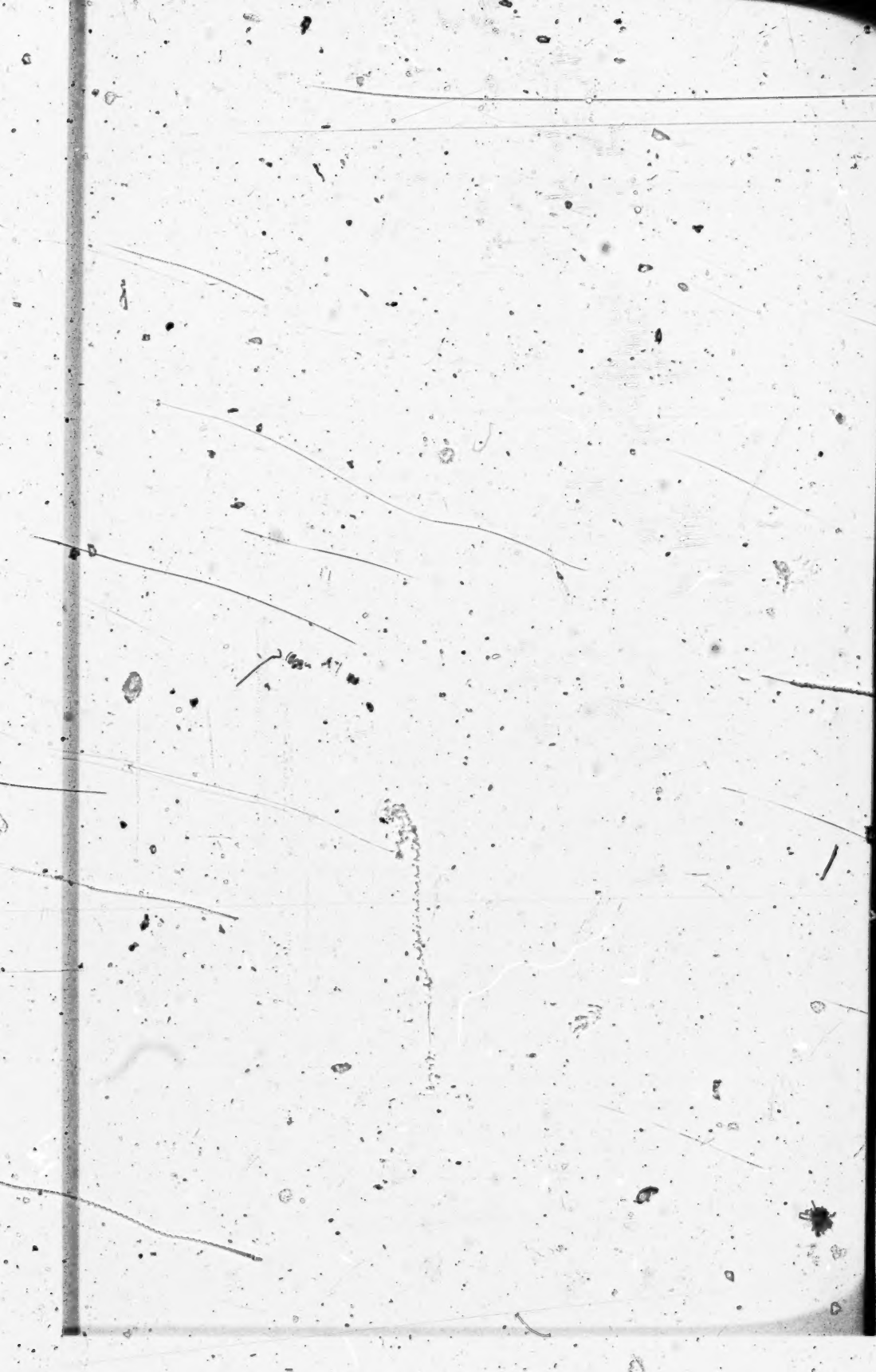

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 555

GEORGIA PUBLIC SERVICE COMMISSION, JAMES A. PERRY, ALBERT J. WOODRUFF, ET AL., appellants

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION ET AL., appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the specially constituted District Court upon the application for a preliminary injunction (R. 162) is reported in 39 F. (2d) 167. The opinion of that court upon final hearing (R. 168) is reported in 42 F. (2d) 467.

The reports of the Commission appear as Docket No. 17517, *Rates on Chert, Clay, Sand, and Gravel within State of Georgia* (R. 12, 88) and are reported in 122 I. C. C. 133 and 160 I. C. C. 309.

QUESTIONS

The ultimate question is whether the orders, herein involved, entered by the Interstate Commerce Commission under Section 13 (3) and (4) of the Interstate Commerce Act, and which prescribed Georgia intrastate rates on sand, gravel, and other allied materials, in carloads, for the purpose of removing undue prejudice against interstate shippers and unjust discrimination against interstate commerce are valid orders.

Subordinate questions going to the validity of the order are whether the Commission acted within its constitutional and statutory authority, with due regularity and certainty, and upon substantial evidence.

THE STATUTES

Pertinent provisions of the Interstate Commerce Act (24 Stat. 379) as amended by the Transportation Act of 1920 (41 Stat. 456), are:

> SEC. 3 (1) That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. (24 Stat. 379, 380; U. S. C., Title 49, Sec. 3 (1).)

SEC. 13 (3) Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned * * *, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, * * * the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered * * * to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this Act. (41 Stat. 456, 484.)

(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference,

or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceedings affected thereby, the law of any State, or the decision or order of any State authority to the contrary notwithstanding. (41 Stat. 456, 484; U. S. C., Title 49, Sec. 13 (3) and (4).)

Sec. 15a. (2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate), will under honest, efficient, and economical management and reasonable expenditures for maintenance of way, structures, and equipment, earn an aggregate annual net railway operating income, equal, as nearly as may be, to a fair return upon the aggregate value of

the railway property of such carriers held for and used in the service of transportation: *Provided,* That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

(3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination, it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient, and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: * * * 41 Stat. 456, 488; U. S. C. Title 49, Sec. 15a (2) and (3).)

STATEMENT

Proceedings before the Commission

Pursuant to petition of June 5, 1925, filed by the Atlantic Coast Line Railroad Company, hereinafter called the Coast Line, and other railroads operating in Georgia; the Commission, by order and supplemental order, dated October 5, 1925, and January 4, 1926, respectively (R. 205 to 207), instituted an investigation under section 13 (3) and (4)

of the Interstate Commerce Act (U. S. C., Title 49, Sec. 13 (3) and (4)), to determine whether certain distance rates [1] on sand and gravel and other allied materials [2] prescribed intrastate by order of the Georgia Public Service Commission, dated February 25, 1925, caused undue preference or prejudice as between persons and localities in intrastate commerce, on the one hand, and interstate commerce, on the other hand, or any undue or unjust discrimination against interstate commerce, and to determine what rates, if any, or what maximum or minimum, or maximum and minimum rates shall be prescribed in order to remove such preference, prejudice, or discrimination, if any, as may be found to exist. All railroads operating in Georgia subject to the Commission's jurisdiction were made respondents, and the Governor of Georgia and the Georgia Public Service Commission were given due notice. (R. 15.)

Certain complaint cases and an investigation and suspension proceeding involving the reasonableness and relationship of rates on the same commodities between various points in southern territory were heard on the same record with the case so instituted by the Commission and were dealt with in the same report. (R. 15.) Interventions

[1] Rates are stated in cents per net ton of 2,000 pounds.

[2] Chert, clay, gravel (washed or unwashed), sand (common), straight, or sand and gravel mixed, shale, slag (granulated, lump, or pulverized), stone, granite (crushed) flagging, rubble, or stone screenings. (R. 206.)

were filed on behalf of various shippers, associations, communities and public bodies. (R. 15, 16.)

The first order of the Commission (122 I. C. C. 133) prescribed, in the title case (No. 17517) certain distance scales[3] as a maximum for the establishment of reasonable interstate single-line and joint-line rates on sand, gravel (washed or unwashed), clay gravel, crushed stone, and slag, in straight or mixed carloads, between points in Georgia,[4] and between points in Georgia and points in other states in southern territory, except Florida. The rates so to be established were to be "subject to a minimum weight of 90 per cent of the marked capacity of the car, except that when car is loaded to full visible capacity actual weight shall govern." Certain specified so-called weak or short lines (Appendix B, R. 67) were authorized to charge an arbitrary of 25 cents per net ton in addition to the basic rates (R. 55). In the complaint cases the same bases of rates were prescribed on sand, gravel (washed or unwashed) and clay gravel from Montgomery and Chattanooga, and on slag from Birmingham and other slag-producing points in northern Alabama and from Copperhill, Tenn., to destinations in Georgia and Mississippi. (R. 90.)

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[3] Hereinafter called 17517 scales. See Table A (R. 54). "In computing distances * * * we find that the shortest routes shall be used over which carload traffic can be moved without transfer of lading." (R. 55.)

[4] For interstate application.

At the time of its first report, however, the Commission did not enter an order in respect of Georgia intrastate rates. The proceeding had disclosed that throughout southern territory rates on the materials involved, both interstate and intrastate, were maintained with little regard to rate-making principles. Interstate rates of the trunk-line carriers were as a general rule based on their interstate scales, but, in order to meet competitive situations, many so-called depressed rates had been established to important markets, under which a large volume of the traffic was moved. (R. 20.) Within Georgia, too, there was a commodity scale of rates in effect for application between points on standard lines. "This scale was equivalent to that prescribed by the Georgia Commission in 1915, subjected subsequently to authorized general increases and reductions." (R. 21.) But, similarly as in respect of the interstate situations, the Georgia rates, under which the bulk of the traffic had been moving prior to 1925, were competitive depressed rates. The Georgia Commission order of 1925 prescribed single-line and joint-line scales as a maximum for intrastate application. While the basis was generally lower [5] than

[5] On crushed stone the required reduction was sweeping. Between important Georgia origins and destinations the average rate prior to 1925 was 140 cents. The 1925 order reduced to 103 cents and that of 1928 to 96 cents, which latter is 19 cents under the prescribed interstate 17517 scale. (R. 727; Ex. 158–B.)

the theretofore scales (Table, R. 23, 24), the effect of the order was to permit the raising of the numerous depressed intrastate rates; and it also had the result of bringing about like increases in the competitive depressed interstate rates. (R. 28, 220, 221.)

Because of these results from the Georgia order the Interstate Commission considered that "it could not be found from this record to have brought about a rate situation which has in the past been unjustly discriminatory against interstate commerce." But it pointed to the fact that it was approving in the proceedings a distance scale of rates for application to all of the commodities and said that there was, of course, no transportation reason for the maintenance of a different basis of intrastate rates within Georgia than that found reasonable for interstate transportation. (R. 59.) The reason that no findings were made for the future and that no order was entered "concerning the Georgia intrastate rates was because this Commission, desirous of fostering and encouraging the spirit of cooperation between it and the State Commissions 'felt that the Georgia Commission will cooperate in authorizing such revisions as may be necessary to bring their rates into harmony with the interstate adjustment herein approved.'" (R. 93.)

In a subsequent decision on further hearing (140 I. C. C. 85) the 17,517 scales were prescribed for

interstate application to and from points in Florida south of the line of the Seaboard Air Line Railway, from Jacksonville to River Junction, Fla., plus certain arbitraries for that part of the haul in Florida lying south of that line.

Upon application the Commission granted relief from the long-and-short-haul clause of the 4th section of the Act so as to enable railroads other than those constituting the direct rate-making routes between points of production and consumption[6] to participate in the traffic.

As a result of the above orders of the Commission and later voluntary extensions by the carriers, the 17517 scales became established on interstate traffic throughout most of the southern territory, except between points in that portion embracing Mississippi and the western portions of Kentucky and Tennessee, and referred to as the Mississippi

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[6] Section 4 forbids the carriers from charging more for a shorter than a longer haul over the same route, except after obtaining Commission authority. The 4th section relief so granted "authorized said respondents to maintain on this traffic from any point of origin to any point of destination within the scope of the proceedings the lowest rates applicable over any routes between the same points constructed on the basis prescribed in the report and to maintain higher rates, not exceeding the scale basis, from, to, and between intermediate points. * * *"

"* * * It readily can be understood that if this relief were not accorded, the rate-making route would secure all of the traffic between competitive points. It is our usual practice, subject to appropriate limitations, to grant relief from the provisions of the fourth section in such situations as here disclosed." (R. 108.)

Valley. (R. 91.) In addition to the comprehensive establishment interstate of said 17517 scales, they were accepted for intrastate traffic within North Carolina and Alabama, and also within Kentucky and Tennessee, except the western portions thereof, namely, the above-mentioned Mississippi Valley section of southern territory, which also embraces Mississippi. (R. 91.) As to the Peninsula of Florida, transportation conditions were not the same as in southern territory generally. (R. 51.)

In Georgia there was "no transportation reason for the maintenance of a different basis of intrastate rates on these commodities * * *." (R. 59.) Following issuance of the Commission's first report and upon petition of the carriers, the Georgia Commission conducted an investigation and, on March 13, 1928, issued an order in which "it refused to authorize the application of these scales within Georgia, but directed the carriers to establish, on May 1, 1928, a different scale of rates. Those rates became effective within Georgia on May 1, 1928, as ordered." (R. 92.) Upon supplemental petition of the carriers the Interstate Commission reopened the proceedings[1] to determine whether the rates and minimum weights so prescribed by the Georgia Commission on intra-

[1] Including complaint proceeding No. 17763, *Roquemore Gravel Co. et al.* v. *Atlanta, Birmingham & Atlantic Ry. Co. et al.*, as to the issue of the relation of Georgia intrastate rates to the rates from Montgomery, Ala., and Chattanooga, Tenn., to destinations in Georgia. (R. 92.)

state traffic, in relation to the interstate rates and minimum weights prescribed on interstate traffic, cause, or will cause, any undue or unreasonable preference or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate commerce, on the other hand, or any unreasonable or unjust discrimination against interstate commerce; The Governor of Georgia and the Georgia Public Service Commission were given due notice. And there were various interventions in support of the attack upon, and in defense of, the Georgia Commission's order. (R. 93.)

In answer to the contention that the proceedings should have been reopened also for the purpose of determining a reasonable basis of interstate rates, the Commission pointed out that the 17517 scales had been recently prescribed in the proceedings after exhaustive investigation and were established throughout the greater part of southern territory. It added:

> If the contention made on behalf of the Georgia Commission in this regard were sound, then our efforts to secure cooperative action in situations such as here presented instead of bringing about that result could be made the instrument of burdening this commission with endless investigations covering the same subject matter and would result in litigation being prolonged indefinitely. (R. 93.)

At the hearings in the reopened proceedings it was shown that in contrast with the interstate scales[8] the Georgia Commission's order prescribed one scale of rates for application to both single-line and joint-line hauls, no joint-line arbitraries being provided for in any case. Up to 200 miles the Georgia standard scale is in some instances the same, and in other instances less than the 17517 single-line scale, and in all instances up to 220 miles it is less than the 17517 joint-line scale. For the longer distances the Georgia scale is in some instances the same and in some instances even higher than the prescribed interstate scales. (See Table R. 94.) Commenting on the gradations in the Georgia scale, it is said in the Commission's report that "the evidence indicates that practically all of the intrastate movements of this traffic within Georgia are less than 200 miles." (R. 95.)

Furthermore, the Georgia Commission authorized an arbitrary for short or weak lines of 10 cents only over its standard line scale, as compared with the 25-cent arbitrary allowed by the Interstate Commission. The conditions imposed by the Georgia Commission in respect of minimum carload weight were also different from those prescribed by the Interstate Commission. (R. 95.)

[8] The prior Georgia order of 1925 provided for a joint-line, as well as single-line, scale for distances under 100 miles. (R. 222.)

Supplementing the evidence as to the difference between the 17517 scales prescribed interstate and the Georgia Commission scale, exhibits were introduced showing the interstate rates established on the basis of the 17517 scales from numerous representative shipping points to representative destinations (46) in Georgia; showing the state rates from representative Georgia origins to the same destinations established on the basis of the Georgia Commission scale; and showing the amounts by which the Georgia rates differ from the 17517 basis. It was shown and, indeed, accepted as a fact that there is no transportation reason for the maintenance of a different basis of rates on intrastate traffic than on interstate traffic. (R. 110, 51.) It was shown, and, in fact, accepted by all, that there is keen competition between interstate and intrastate shippers for the Georgia markets (R. 95) and between interstate and intrastate shippers for the markets in other states in southern territory (R. 627). In addition to the competition between materials of the same kind, there was the consideration "in the building of roads, clay gravel, crushed stone, slag, and washed gravel compete with each other, in that the choice of one for a particular project renders the use of the other practically unnecessary." (R. 17.)

The commodities involved "are among the lowest valued offered for transportation." (R. 17.) Their very low value "makes the cost of transportation a most vital matter * * *." (R. 52.)

"In the price to the consumer the cost of transportation is a heavy factor." (R. 53.) From which it follows that it is particularly true of this traffic that a basis of charges favoring intrastate shippers must vitally prejudice interstate shippers competing with Georgia producers in Georgia markets. Furthermore, the commodities are of the bulky variety to which the railroads must now look for much of their traffic. They are used chiefly in the building of highways and in concrete construction work. The programs of the States in southern territory for improved highway construction have called for progressively increasing consumption thereof. During the year 1924 Class I railroads originated in southern territory, exclusive of the Pocahontas region, 23,700,740 tons of such commodities, which tonnage was exceeded only by that of forest products and of bituminous coal. (R. 17.)

The Commission's report, following the further hearings, found that the Georgia state rates "*to the extent that they are lower,* distance considered, than the interstate rates" result and will result in undue preference of interstate shippers and in undue prejudice to interstate shippers, and unjust discrimination against interstate commerce. Its further finding was that *said* undue preference and undue prejudice and unjust discrimination can and should be removed by the establishment and the maintenance of intrastate rates which shall not be lower, distance considered, than those contemporaneously applicable to the interstate traffic between

points in Georgia, and from points in other states in southern territory, except Florida, to points in Georgia, not exceeding the scale heretofore found reasonable in these proceedings for said interstate transportation. (R. 110, 111.) With its report the Commission entered an order for the carrying out of said finding. (R. 115.)

The Commission made similar findings and order in the complaint proceeding, heard with the title case, which involved the relationship as between the Georgia rates and interstate rates from Montgomery and Birmingham, Ala. (R. 111, 112, 116.) Speaking of the complainant in that case, the Commission had said:

> The Roquemore Gravel Company, complainant in No. 17763, produces sand and gravel in very large quantities at its plant at Montgomery. Testimony given for this complainant at the original hearing was to the effect that it endeavors to sell its product in as wide a territory as possible, including Georgia, and that in this endeavor it encounters actual or potential competition from producers of competing materials wherever located. * * *
>
> * * * The Montgomery complainant maintains sales organizations at Atlanta and Albany, Ga., at an approximate cost of $20,000 per year. Such agencies keep in close touch with construction programs in the State and aid in securing sales contracts for this complainant. * * * In the past

complainants' shipments to Georgia have been chiefly to Atlanta and points south thereof. Complainant now attempts, however, to market its products at all points in Georgia with the exceptions hereinafter noted.

* * * Complainant does not attempt to do business at northern Georgia points, as it is unable to compete with northern Georgia stone producers because of the amounts of freight-rate differences. With equality of both interstate and intrastate rate levels, however, complainant expects to be able to compete throughout the entire State of Georgia." (R. 102.)

Assigning various errors in the Commission's report and order of December 9, 1929, counsel for the Georgia Commission filed on January 15, 1930, petition for a rehearing before the Interstate Commerce Commission, which was denied on February 3, 1930. (R. 118.)

Proceedings in the District Court

February 18, 1930, appellant Georgia Public Service Commission filed its bill to enjoin the order of the Interstate Commission, (R. 1 to 11) with which there was consolidated (R. 162) a bill filed for the same purpose by the State Highway Board of Georgia and other interested parties. (R. 148 to 149) March 1, 1930, the lower court entered an order denying the application for an interlocutory injunction. (R. 168.) June 25, 1930, following

final hearing on the application for permanent injunction, an order was entered dismissing the bills. (R. 172.)

SUMMARY OF ARGUMENT

I. Appellants were granted full hearing as to the reasonable level of interstate rates as well as to the relationship of state and interstate rates. Their contention that the Commission failed to follow the procedure outlined in Section 13 (3) and (4) of the Interstate Commerce Act because, in reopening the proceeding as to the relationship between state and interstate rates, it did not also reopen for the purpose of again determining the the reasonable level of interstate rates, is without merit. Appellants and all parties had full opportunity to be heard on that question at the first hearings and availed themselves thereof. By the Commission's first order and voluntary extensions of its application made by the carriers, the interstate basis of rates had become established throughout southern territory except Florida and the Mississippi Valley; and it had been adopted for intrastate application within Alabama, Kentucky, Tennessee, and North Carolina. If appellants seriously contended that between the first and later hearings circumstances and conditions had substantially changed, they should have offered concrete proof.

II. The Commission's findings that the state rates unduly preferred state shippers and unduly

prejudiced interstate shippers was supported by a very full record. Discrimination was shown not only at border points but in respect of representative state origins and representative state destinations throughout Georgia. It was admitted and shown that transportation conditions, state and interstate, were substantially the same, and that a keen competitive situation existed between state and interstate shippers for the Georgia markets. The showing of injury to interstate shippers resulting from lower rates accorded competitive state shippers under substantially similar transportation conditions was aggravated by the fact that since transportation cost on this low-grade traffic was a heavy factor in the price to the consumer, differences in rates vitally affected sales. Corroborative evidence of injury was furnished by testimony showing that the difference in rates had actually closed certain Georgia markets theretofore enjoyed by some interstate shippers, and tending to show that it had prevented the securing of contracts or had influenced interstate shippers not to bid for contracts.

III. The Commission's findings in respect of undue preference and undue prejudice are particularly full and complete. There is no merit in appellants' contention that the Commission must make specific findings in respect of transportation conditions between each of the hundreds of origins and destinations intrastate as compared with those

obtaining over each of the hundreds of point-to-point routes interstate.

IV. There is substantial evidence to support the Commission's order "as one needed to avoid an undue burden on the revenues of the carriers." The first hearings showed that the traffic was of great and growing importance to the carriers, that carrier competition had resulted in a distorted rate structure, the bulk of the traffic being handled on so-called depressed rates, and that the wide general revision of rates there undertaken was for the purpose of putting an end to the burden imposed on other commerce by this situation. At the second hearings figures were given by important carriers showing for a four-month period after the Georgia rates had been established the differences between revenues actually accruing to them and their connecting carriers under the Georgia rates, and those that would have accrued if the state rates had been on the interstate basis. Tonnage figures were supplied by other carriers showing the amount of traffic moving intrastate and interstate during said period. There was evidence that at some points in Georgia there was resulting the old competitive conditions of rates depressed even below the Georgia basis.

Because of the nature of the traffic and other considerations the interstate basis of rates prescribed was low. Departures from that basis would necessarily tend to break down the general adjust-

ment, burdening other commerce, and the Commission so admonished the carriers.

V. The Commission's findings on the revenue burden feature are adequate when taken in their context and together with its other statements. There was no evidence that the prescribed rates would result in curtailment of the traffic or diversion into other than railroad channels. The Commission reviewed categorically the evidence submitted by the carriers showing the difference in revenue under the Georgia rates and the interstate rates, and set forth the results in its report. Moreover, the revenue burden feature of this case is only in part like that to which the decision in *Florida* v. *United States*, 282 U. S. 194 (upon which appellants rely) is directed. The wide adjustment of interstate rates made in the proceeding was largely for the purpose of terminating carrier competition, closely approaching rate wars. The Commission expressed its apprehension that the low rates prescribed in Georgia might bring about a general reversion to the old conditions of competitively depressed rates.

VI. The Georgia rates prescribed are definite and certain. Before ordering the carriers to establish state rates not lower than the contemporaneously applicable interstate rates, the Commission ascertained and stated in its report that the carriers, in establishing their interstate rates, had conformed to the maxima fixed in its first re-

port with certain exceptions which were to be corrected or would be automatically adjusted in application under its order. Considering the scope of the proceeding, the certainty in operation of the orders is particularly marked.

ARGUMENT

I. THE COMMISSION'S HEARINGS WERE FULL IN RESPECT OF THE REASONABLE LEVEL OF INTERSTATE RATES AS WELL AS THE RELATIONSHIP OF RATES, STATE AND INTERSTATE, THE FIRST HEARINGS HAVING BEEN DEVOTED PRIMARILY TO THAT ISSUE

It has been above shown that, following the first hearings in the proceeding, the Commission prescribed the reasonable level of interstate rates. At that time it issued no order in respect of Georgia rates, it being its hope that the State would itself authorize or order respondent interstate carriers to establish state rates justly related to the level of interstate rates found reasonable and lawful by the Commission. This procedure conformed to the spirit of the suggestion in *Wisconsin R. R. Comm.* v. *C. B. & Q. R. R.*, 257 U. S. 563, 591, of cooperation between the Interstate Commission and the State Commissions. Appellants contend, however, that the Commission failed to follow the procedure laid down in section 13 (3) and (4) of the Act because, in reopening the proceeding in respect of the relationship between the state and interstate rates, it did not also reopen for the purpose of again determining the reasonable level of interstate rates.

In answer to this contention the Commission's second report states:

> As heretofore stated, the 17,517 scales were recently prescribed in these proceedings for interstate application after an exhaustive investigation and are now applied on interstate traffic throughout the greater part of southern territory. The only reason that no findings were made for the future or order entered in the original proceedings concerning the Georgia intrastate rates was because this commission, desirous of fostering and encouraging the spirit of cooperation between it and the State commissions, "felt that the Georgia commission will cooperate in authorizing such revisions as may be necessary to bring their rates into harmony with the interstate adjustment herein approved." The Georgia commission has authorized a revision. Respondents and others complained and are here contending that this intrastate revision is so out of harmony with the approved interstate revision that it has brought about an unlawful relationship. For the purpose of determining whether or not this is the fact, the proceedings were reopened and the further hearing had. The scope of the further hearing was properly limited to the question indicated. If the contention made on behalf of the Georgia Commission in this regard were sound, then our efforts to secure cooperative action in situations such as here presented instead of bringing about that result, could be made the

> instrument of burdening this commission with endless investigations covering the same subject matter and would result in litigation being prolonged indefinitely. The contention is without merit. (R. 93.)

In disposing of this same contention of appellants, the Lower Court, among other things, said:

> A full hearing was undoubtedly given prior to the order of January 21, 1927. * * * New interstate rates were in that very proceeding established as reasonable, and the opinion expressed that as no transportation differences existed the state rates ought to conform in order to escape future discrimination, but no positive order of conformity was then issued in order that the state commission might work the state rates out for itself. * * * Ordinarily nothing would then be left for examination except whether the new state rates did so conform to the new interstate rates as to escape discrimination. * * * If the Georgia Commission had any definite proof of altered conditions, it should have been concretely offered. We discover no abuse of procedure in reaching the order of December 9, 1929, in the evidence now before us.

We believe that nothing need be added to what was said by the Commission and the Lower Court with respect to the procedural objection made by appellants.

Appellants apparently do not assert that there was not substantial evidence adduced at the first

hearing in support of the Commission's order prescribing rates for interstate application, except that they allege that the record did not warrant the differential prescribed for joint-line hauls. However, the scope and nature of the general evidence will be briefly described, together with a more detailed statement of the evidence supporting the joint-line differential.

The evidence before the Commission was of the kind upon which it usually reaches its rate decisions. There was a large volume of material, furnishing rate comparisons on the same or similar commodities in the same territory and in other territories. There were the scales proposed by the carriers (R. 23, 275, Ex. 1), the proposed scales of the Georgia Commission (R. 602, Ex. 244, consisting of 28 pages), the proposed scales of the complainants (R. 279, 253), and the proposed scales of certain intervening shippers (R. 554–560). In their said exhibits, or other exhibits,[9] these parties furnished comparisons with other scales on the same or other low-grade commodities in the same or in other territory. (R. 53.) They also furnished exhibits showing the prevailing level of the rates which in fact moved the traffic in the territory. The history of the rates was given by testimony and exhibits. (R. 319–343.) Estimates of ton-mile and car-mile earnings were submitted by

[9] Carriers' exhibits 34–81, complainants' exhibits 3–27, Georgia Commission's exhibit 244.

the carriers under their proposed scales and under the scales of the Georgia Commission. (R. 43, 349, Ex. 57.) Testimony as to the values of the commodities were given by various producers. (R. 19, 301.) Evidence as to the tonnage transported, its percentage to other traffic, and the revenues derived therefrom was supplied. (R. 17, 320, 435.) There was affirmative testimony that transportation conditions were substantially the same throughout the territory and also a stipulation of the parties to that effect. (R. 276, 246, 256, 259, 311, 50, 51.) A reading of the first report will show that the parties furnished the Commission with an unusually comprehensive record.

1. Joint-line differentials

The reason for prescribing a rate differential for hauls made over joint-line routes was, of course, to give effect to the additional costs incidental to any interchange at junction points.

Appellant's assertion (Br. 83) that there was no evidence to warrant the prescribing of a joint-line scale is not borne out by this record. While it is true that cost studies or tests were not made at each of the junctions involved in the territory, still there was the fact that joint-line arbitraries were proposed by the carriers, and there was evidence and testimony offered by the proponents of kind and character that might be reasonably expected in the case. (R. 345 to 351.) Exhibit 51 compares the joint-line scale proposed by the carriers with all of

the joint-line scales applicable on the commodities in Southern territory. Exhibit 52 shows, in cents per ton for representative distances, the amounts by which joint-line rates exceed single-line rates on classes and on various commodities under the carriers' proposed scales and under mileage scales prescribed in 1921 by the Georgia Commission. Exhibit 53 shows, in cents per ton for representative distances, the amounts by which joint-haul rates exceed single-line rates on various commodities under the mileage scale submitted by the carriers in 1921 to the Alabama Commission and under mileage scales prescribed by that Commission. Exhibit 54 shows comparison of single and joint-line scale of lumber submitted by the carriers to the Georgia Commission compared with scales used in revising rates on lumber from southeastern to Carolina territory and between points in Carolina territory. Exhibit 55 contains excerpts from decisions of the Interstate Commission in cases dealing with the question of joint-line differentials. Exhibit 56 shows the extent of the movement of these commodities over various carriers in Southern territory for year 1924 and the average load. It further contrasts this movement in the south with movements in other districts of the United States, showing the great importance of the traffic in the south. Exhibit 57 shows the carriers' proposed scales and the Georgia Commission's scales applicable for single and joint-line hauls on these commodities and ton-mile earnings under each.

In presenting these exhibits the witness described and discussed them, particularly the showing in respect of ton-mile earnings. He also expressed his views as to the need of a joint-line scale as follows:

> The expense of handling this traffic over two or more lines is greater than the expense of a one-line haul. The Georgia Commission's proposed single-line scale is, we think, too low, when the entire revenue accrues to the line performing the single-line haul. But when we get beyond 100 miles they allow no addition when the service has to be performed by two or more lines, although the expense is greater than for the single-line service. (R. 346.)

A further exhibit in respect of joint-line differentials was introduced on behalf of certain Georgia producers, which is described in the testimony. (R. 569, 570.) Among other things, the witness said:

> In regard to the two-line differential in central states territory, as a general proposition, *unless the rates are too low,* there is no distinction made as to single and joint lines. * * * In the Pennsylvania Case, while no issue was made as to the two-line rates, the Commission did adopt a 20-cent differential for joint-line hauls. In the western states it is the usual practice not to add a differential for two-line hauls, but to take a single percentage of the single-line rate and add them together to arrive at the

> basis of joint hauls. There have been various decisions of the Commission in the western territory fixing a differential of 20 cents per ton, and it is my opinion on the joint-line haul rates that there should be some arbitrary added to the single-line rate for all distances in order to cover the cost of interchange between the two lines. That would apply whether it was 20 miles or whether it was 200 or 2,000. It is just as much a fixed charge as a terminal charge at the original points and at the destination.

In addition to the record evidence, it is certainly within the field of the Commission's expert knowledge that additional costs are involved in joint-line hauls.[10] There is no dispute in the evidence but that they are incidental to such hauls, the question being merely as to whether they should be given effect by a joint-line differential or in a slightly higher single scale, applicable to both kinds of hauls. The rate expert of the Georgia Commission testified:

> It is correct to say that in prescribing rates on sand and gravel in its first order,

[10] The same engine and train crew do not go through. Cars are switched to interchange tracks and perhaps held there for a time. There is more bookkeeping, the part of each carrier in the transaction having to be carried through in its accounts and interline settlements. *Brush Creek Co.* v. *L. & N. R. R. Co.*, 39 I. C. C. 449. Cost tests to determine average amount of switching at each and every junction, average time cars held idle on interchange tracks, average loss of labor time due to changing train crews, would seem to be impracticable in a case of this kind.

effective April 1, 1925, the Georgia Commission did provide for joint-line differentials under 100 miles, but when these rates were again revised, effective May 1, 1928, the single-line rates were generally increased and all joint-line differentials eliminated. (R. 740.)

The method of giving effect to the additional costs by a somewhat higher single rate for both single-line and joint-line movements has great practical advantages, particularly in the matter of simplicity of tariff construction, and the Commission has regarded it as warranted where the traffic is of higher grade. That was in fact done in the *Alabama Fertilizer case*, No. 513, recently argued before this Court, and there the complaint of the Alabama Commission was that the adoption of a single scale for both single and joint line hauls forced "shippers using only a one-line haul to pay more than the reasonable rate therefor in order that another shipper may use a joint-line haul at less than the reasonable rate therefor." But sound reasons for the distinction existed; in that manufactured fertilizer materials are of decidedly higher grade than sand, gravel, slag, and the like. The latter traffic is of the lowest grade and where, as here, the whole haul is short, and consequently the revenue to be divided between the carriers is small, compelling reasons are furnished for giving effect to the added costs in the rates made over joint lines.

In this connection the Commission said in the instant case:

> * * * In the case of the commodities under consideration, however, there is perhaps more basis for joint-line arbitraries than in the case of any other form of traffic. The very low value of these commodities makes the cost of transportation a most vital matter, and it may well be that even the slight increase in rate level over the single-line routes which the elimination of joint-line arbitraries would entail ought to be avoided. Undoubtedly the greater proportion of this traffic moves over such routes. At all events we have reached the conclusion that in the case of these commodities joint-line arbitraries may reasonably be permitted, but should be of lesser amounts and disappear at an earlier stage of the scale than the carriers propose. But this should not be construed as an indication that we favor joint-line arbitraries in the case of traffic of higher grade. (R. 52.)

The Commission in its final report, referring to the consideration given by it to this question in its earlier report, said:

> * * * but after mature consideration, we there reached the conclusion that on this low grade traffic joint-line arbitraries should be prescribed. It might also be added that most of the interests represented there advocated the prescription of joint-line arbi-

> traries. The fact is we have never prescribed for general application in any territory one scale for both single-line and joint-line hauls of this traffic. (R. 106.)

Thereafter the Commission went on to emphasize that the real question was whether the Georgia order had brought about a rate relationship which was unduly prejudicial of interstate shippers and unjustly discriminatory of interstate commerce. If, within Georgia, the single-line scale [11] is to be allowed for hauls made over joint lines, then, to avoid undue prejudice against interstate shippers, it would be forced on the interstate rate structure. But, as said in *The Shreveport case*, 234 U. S. 342, 354, in respect of state and interstate rates charged by interstate carriers:

> * * * the power to deal with the relation of the two kinds of rates, as a relation, lies exclusively with Congress. It is manifest that the State cannot fix the relation of the carrier's interstate and intrastate charges

[11] It should further be kept in mind that the Commission's single-line scale is not, as in the *Alabama Fertilizer Case*, a single scale made somewhat higher because for application over both single and joint-line hauls; also that even for single-line hauls the Georgia scale is only in part the same as the Commission's single-line scale. The Federal Commission has fixed the standard for single-line and joint-line rates. There is no more reason why it can not control the minimum level of the latter than of the former. And it must have that power if it is to prevent disruption of the rate structure on this traffic and preserve a lawful rate relationship.

> without directly interfering with the former, unless it simply follows the standard set by Federal authority.

In respect of the contention made by Georgia interests that single-line-mileage was preponderant from certain important interstate origins, the Commission referred to rebuttal evidence (R. 806 to 813) and said:

> It is shown that from Alabama City the joint-line scale would apply to 5,683 miles within Georgia as compared with 1,024 miles to which the single-line scales would apply. From Montgomery the ratio would be 4,695 joint-line and 1,980 single-line mileage, and from Birmingham 4,581 joint-line and 2084 single-line. (R. 107.)

The witness introducing said rebuttal evidence, after explaining in substance that adversary witnesses regarded as single-line movements all possible mileage where the origin and destination were on the same railroad, no matter how roundabout the route, had said (R. 806):

> In my exhibit I set forth the mileage within Georgia to which the joint-line arbitrary is in fact charged in connection with interstate movements from Alabama City, and for the purpose of that exhibit I checked out the specific rates from Alabama City to every point in Georgia and found whether they were made on single-line or joint-line scale. (R. 806.)

II. THE COMMISSION'S ORDER PRESCRIBING RATES WITHIN GEORGIA FOR REMOVAL OF UNDUE PREJUDICE AGAINST INTERSTATE SHIPPERS WAS WITHIN ITS AUTHORITY AND WAS SUPPORTED BY A COMPREHENSIVE RECORD

1. The evidence is exceptionally conclusive in that it includes, not only the very full record which enabled the Commission to adjust the interstate rates in the territory involved and upon which it could at that time have established the state rates, but also includes evidence adduced at hearings held after establishment of the adjusted interstate rates, and of the state rates under the Georgia Commission's order of 1928

The purpose of the Commission's order prescribing rates within Georgia was twofold: (1) to remove undue prejudice against interstate shippers of the same commodities, and (2) to remove unjust discrimination against interstate commerce as a whole.[12] Intrastate rates imposed upon interstate carriers by state authority, which cause either form of such discrimination warrant entry by the Interstate Commission of an order for its removal. *Wisconsin R. R. Comm.* v. *C. B. & Q. R. R.*, 257 U. S. 563, 579.

The sweep of the Commission's order is statewide,[13] but it is in respect of rates on a particular class of commodities, namely, sand, gravel, and allied materials, exacted from producers, competing

[12] The revenue burden imposed upon other commerce of interstate carriers by preferentially low state rates.

[13] To the extent that the state rates were lower distance considered than the interstate rates.

with each other for the Georgia markets in those materials. If the rates charged one producer are improperly related to the rates of his competitors, there exists discrimination in fact, and this is true, not only as to points of consumption within Georgia where he is actually doing business, but also as to all points of consumption at which he would be able to compete for business under properly related rates. Such discrimination in fact is not of course justified at law by reason of the preferential rates being between points of production and consumption within the same State. The question is as to the correctness of the premise that the rates are improperly related, and that question is one of administrative fact.

The importance of territorial, rather than piecemeal, adjustment of rates on particular commodities has become progressively clearer with each year's work of the Commission. It will be seen that the removal of discrimination as between two rival points of origin by the raising, or lowering, of the rate from the one origin or the other may place the changed rate out of proper alignment with a rate from a third origin. A further proceeding correcting that situation may be the occasion for complaints in respect of still other rates. Of course, distance from market is a natural disadvantage just as nearness to market is a natural advantage. In the adjustment of rates both must be given recognition, within reasonable limitations.

But it must be kept in mind that distance is not an exact yardstick for the measure of rates. It has long been recognized by the carriers and regulatory bodies that the unit (per car-mile) cost of transporting and handling long-haul traffic is less than for the shorter hauls, this being due to the fact that in such longer movements the switching and other expense at origin and destination and the overhead and other fixed costs are spread against more miles of revenue-producing business. This is not to say, however, that the only nether limitation on the rates for long-haul traffic is that it must not be noncompensatory. It must yield a proper profit—all elements considered. The problem is essentially one of judgment and distance scales, such as are here involved, are designed to give effect to all elements. Many distance scales have been initiated by the carriers as well as prescribed by the regulatory bodies, state and federal. (R. 20.)

As above outlined, the Commission, following the first hearings in its proceeding, fixed maximum distance scales for interstate application between points in Georgia and between points in Georgia and points in other States in Southern territory, except Florida. Rates under these scales became effective October 1, 1927. And there followed the voluntary extensions of said scales by the carriers and the adoption thereof by the States heretofore mentioned. At the time of its first report, however, the Commission made no order

in respect of Georgia intrastate rates, but expressed the belief that the Georgia Commission would itself adjust state rates in harmony with the interstate adjustment. The Georgia Commission did not respond to this suggestion, but instead prescribed a different scale of rates under which intrastate rates were established, effective May 1, 1928. Upon petition of the carriers the proceeding before the Interstate Commission was reopened and evidence introduced of the rate relationship under the conflicting scales and of actual conditions resulting therefrom.

When entering its final order, therefore, the Commission had the benefit, firstly, of the full record which had enabled it to adjust interstate scales in the general territory involved, and which led it to express the opinion, in substance, that as no transportation differences existed, the State rates ought to conform thereto. (R. 164.) As said by the lower court in the reopened proceeding after the State rates had been established, ordinarily nothing would be then left for examination except whether the new State rates did so conform to the new interstate rates as to escape discrimination. (R. 165.)

Secondly, the Commission had the benefit (unusual in these cases) of evidence introduced after establishment of the adjusted interstate rates and the establishment of the different state rates, which furnished it with data as to the departures in State

rates from the basis which it had found reasonable under transportation conditions prevailing in the territory, as to the actual preferences in rates resulting to intrastate shippers and as to actual conditions growing out of the situation.

2. The evidence of undue preference of intrastate shippers and undue prejudice against interstate shippers is state-wide in scope

In *Wisconsin R. R. Comm.* v. *C. B. & Q. R. R.*, 257 U. S. 563, involving a horizontal increase in intrastate passenger fares ordered by the Commission this court said at page 579:

> The report and findings of the Commission undoubtedly show that the intrastate fares work an undue discrimination against travelers in interstate commerce and against localities * * * in typical instances numerous enough to justify a general finding against a large class of fares. * * * Any rule which would require specific proof of discrimination as to each fare or rate and its effect would completely block the remedial purpose of the statute.

The Court has thus recognized the impracticability in a case of this kind of securing specific proof of unlawfulness of each of the literally thousands of point-to-point intrastate rates in its relationship to each of the thousands of point-to-point interstate rates. This recognition is of great importance, for from the beginning the outstanding purpose of the

Act to Regulate Commerce has been to do away with discriminations as between persons.[14] The *Shreveport Case*, 234 U. S. 342, 356. And, if that purpose is not to be frustrated, a method must be pursued by which the task may be performed. As said in *New England Divisions Case*, 261 U. S. 184, 197, in respect of the fixing of divisions of joint rates:

> * * * The number of carriers which might be affected by an order of the Commission, if the power granted were to be exercised fully, might far exceed six hundred; the number of rates involved, many millions. The weak roads were many. The need to be met was urgent. To require specific evidence and separate adjudication in respect to each division of each rate of each carrier would be tantamount to denying the possibility of granting relief. * * *
>
> For many years before the enactment of Transportation Act, 1920, it had been necessary, from time to time, to adjudicate comprehensively upon substantially all rates in a large territory. When such rate changes were applied for the Commission made them by a single order; and, in large part, on evidence deemed typical of the whole rate structure. * * *

[14] As distinguished from the "revenue burden" discrimination, in respect whereof business rivalry is not necessarily an element, discriminations between competing shippers and localities has the effect of stifling the business and commerce of the country.

In the *Wisconsin Railroad Commission case, supra,* the showing of typical instances of undue prejudice against persons and localities was confined to border points and, while the decision recognized that these instances justified extending the order to include all fares from all points in the State to border points it, nevertheless, held that the showing there made did not justify the extending of the order to include "fares between all interior points [15] although neither may be near the border and the fares between them may not work a discrimination against interstate travelers at all" and "when it is clear that this would include many rates not within the proper class or the reason of the order." (Page 580.) In short, the holding is that, where a Commission order rests upon typical evidence, its scope should naturally be limited to matter as to which the evidence is typical or representative. There is nothing in the decision that holds, or even indicates, that an order which rests upon undue prejudice against interstate shippers must be restricted to rates to and from border points. The showing of typical instances there made happened to be of discrimination at border points. But in the instant case, as will be shown, discrimination is not confined to border points. Producers at interior points, as well as border

[15] The order was upheld in its state-wide application on the finding and showing of unjust discrimination against interstate commerce as a whole—the so-called revenue burden cast upon other commerce by unduly low state rates.

points, are in competition with interstate shippers for the Georgia markets. Competition of interstate producers is in some instances potential rather than active, but it will not be urged that, because now they are altogether shut out of some Georgia markets by improperly related rates, they are not subjected to undue prejudice. As was said in *Nashville Ry.* v. *Tennessee*, 262 U. S. 318, at page 323:

> But a lower rate may result in giving to a single quarry within the State all of the governmental business, so that competing quarries and localities within or without the State, or interstate traffic would be prejudiced.

Competing producers of any commodity are practically always at varying distances from markets. Proximity to market is, as above said, a natural advantage which for transportation reasons should, within reasonable limitations [16] be given recognition in rates. On the other hand, the more distant producer is entitled to properly related rates. *Jefferson Island Salt Co. et al.* v. *United States*, 6 F (2d) 315; *Gulf Ports Preference Cases*, 42 F. (2d) 281; *Lake Cargo Coal Cases*, 139 I. C. C. 367. The shipper who looks to markets in other States is more

[16] As contrasted with the comprehensive rate groupings (blanket rates) often maintained by carriers (*Gulf Ports Preference Case*, 128 I. C. C. 349, 387), distance scales, as heretofore shown, take close account of transportation costs, thereby giving more detailed recognition to the natural advantage of the nearby producer.

often than not a large-scale operator with low unit costs of production, or the commodity to be marketed may be a by-product of his main operations (R. 44, 45, 637) or it may be surplus after supplying nearer markets. (R. 629.) And, on the other hand, the nearby shipper may be a small-scale producer, lacking capacity to fully supply the market. Any such circumstances may and do enable a distant producer to absorb freight differentials in competition with producers nearer a market. (R. 44.) His right to properly related rates can not be denied him because he can not always do so and make a successful bid for the contract. And, of course, interstate shippers may be nearer to some markets than certain, or even all, their rival intrastate competitors.

The Commission's report contains a table (R. 94) comparing the Georgia distance scales with the 17517 scales of the Interstate Commission. It will be remembered that the latter prescribed somewhat higher scales for joint-line routes than for single-line routes, whereas the Georgia Commission prescribed one scale of rates for application over both kinds of routes. Up to 200 miles the Georgia scale is in some instances the same as, and in some instances less than, the interstate single-line scale; in all instances it is less than the interstate joint-line scale. For distances beyond 200 miles the Georgia scale is in some instances the same as, but generally speaking higher than, the interstate single-line scale; in most instances it is less than

the interstate joint-line scale. The Commission's report states that:

> The evidence indicates that practically all of the intrastate movements of this traffic within Georgia are less than 200 miles. (R. 95, 667.)[17]

This statement of the Commission should be kept in mind in considering those gradations in the Georgia scale appearing favorable to interstate commerce. And, as just above said, up to the 200-mile distance the scale is in some instances the same as, and in some instances lower than, the interstate single-line scale; and in all instances it is lower than the interstate joint-line scale.[18]

a. Preferences shown by the rates as established, and resulting detriment to interstate shippers

Referring to exhibits comparing interstate rates and intrastate rates as actually established under the interstate and Georgia scales, respectively, the Commission said:

> Exhibits were introduced by respondents showing the interstate rates from numerous representative shipping points to representative destinations in Georgia,

[17] Among other things, note that distances dealt with in testimony and exhibits of Georgia Commission's rate expert are under 200 miles. (R. 746–753; exhibits 169–B and 176–B.)

[18] The Georgia order in effect prior to the prescription by the Interstate Commission of single-line and joint-line scales had likewise provided for two scales up to 100 miles. (R. 222.)

which rates are on the basis of the 17,517 scales; rates from representative Georgia origins to the same points, which are on the basis of the Georgia Commission scale; and the amounts by which the said Georgia rates differ from the 17,517 basis. (R. 96.)

Exhibits of record fully bear out this statement of the Commission.[19] Summed up, the showing made was that, as to single-line hauls, there were many instances where the intrastate rates were the same as, and for the longer hauls even higher than,

[19] Among others: Exhibit 100-B, of 48 sheets, introduced by General Freight Agent of Coast Line, shows to 46 Georgia destinations, widely scattered throughout the State, distances and rates from interstate shipping points in Alabama, Tennessee, and South Carolina, and distances and rates (both under Georgia basis and interstate basis) from numerous Georgia shipping points (R. 623 to 625); exhibits introduced by Southern Railway show to stations on its lines throughout Georgia distances, routes, and rates from Chattanooga and Macon, Tenn., Birmingham and Montgomery, Ala., and Columbia, S. C., on the one hand, and distances, routes, and rates (both under Georgia basis and interstate basis) from various Georgia origins on the other hand; other exhibits of the Southern Railway show similar information to stations in Georgia on the lines of its connecting carriers, both short-line and trunk-line carriers, from specified interstate and state shipping points (R. 652 to 668); evidence introduced by Seaboard Air Line shows, for actual movements of slag, sand, and gravel, for six months ended June 30, 1928, from Alabama producing points (chiefly the Birmingham and Montgomery districts) to destinations in Georgia on its own or other lines, distances and routes, and rates and revenues based on actual interstate rates compared with rates and revenues for like hauls intrastate on Georgia basis; and in separate exhibits shows, for actual movements of crushed stone (competes with slag, gravel, and sand) during the same

the interstate basis and many instances where they were from 5 to 10 cents under that basis, depending, of course, upon whether the distances fell within those gradations of the Georgia scale which are the same as the single-line interstate scale, or within those which differ from that scale; that, as to joint line-hauls, the intrastate rates were lower throughout than the interstate basis by amounts ranging from 5 to 25 cents, except that, for some few of the long hauls, they were the same as the interstate

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period from Oglesby, Ga., to Georgia stations on the lines of the Seaboard or its connections; distances and routes, and rates and revenues based on the then actual Georgia rates compared with rates and revenues that would have accrued for like hauls from interstate shipping points based on interstate scales; still other evidence of the Seaboard compares in the same exhibits the present rates and revenues on actual movements of slag, sand, and gravel from Alabama origins to Georgia destinations with rates and revenue on actual movements of crushed stone from Ladds, Ga. (R. 674 to 681); exhibit of Birmingham Slag Company shows, with respect to projects on which it had bid and lost to competitors in Georgia, distances, rates, and routes from Ensley, Ala., to numerous Georgia destinations, as compared with distances, routes, and rates (both under Georgia basis and interstate basis) from the successful Georgia producing points (R. 725 to 728). Attention is also called to the testimony and exhibits therein mentioned of other respondent carriers (R. 681 to 693), and to exhibits introduced by appellant Georgia Public Service Commission, showing rates from numerous Georgia producing points to Georgia destinations, both on basis of its order and the interstate basis (R. 745 to 753), and to the admission or stipulation by said commission that there is "very keen competition between the producers of all the materials at the principal markets, both inter and intra state." (R. 772 to 773.)

basis. As will hereinafter be shown, the Commission's findings and order dealt only with those rates that were lower than the interstate rates, and as to those it necessarily follows that state producers were shown to be enjoying a preference. The "undueness" thereof will be hereinafter discussed.

In its report the Commission set forth a table of illustrative data taken from said exhibits. For example, it is shown that from Beverly, S. C., to Gainesville, Ga., a distance of 84 miles, the rate is $1.00, while from Elberton, Ga., distant 87 miles, the rate is 90 cents, or 10 cents under the Beverly rate and 10 cents under the interstate basis. This difference is about 30 per cent of the average selling price of sand and clay gravel. Both hauls are single line. From Montgomery, Ala., to Columbus, Ga., a distance of 95 miles and single-line route, the rate is $1.00, while from Georgetown, Ga., a distance of 90 miles over a joint-line route, the rate is 90 cents. This rate established over a joint line is 10 cents less than the interstate basis for single-line hauls and 25 cents less than the applicable joint-line basis, the preference being about 70 per cent of the average selling price of sand and gravel. The average prices of crushed stone, washed gravel and slag (if crushed and screened) are higher, but still the rate preference will be found to bear a large proportion to the selling price. (Table of prices. R. 19.)

The Commission stated that the commodities involved "are among the lowest valued offered for

transportation" (R. 17); that their very low value "makes the cost of transportation a most vital matter" (R. 52); and that "in the price to the consumer the cost of transportation is a heavy factor" (R. 53). Improperly related rates on any commodities result, of course, in preference and prejudice as between rival producers or dealers, but it would seem to be particularly true of this traffic that rates favoring state shippers must vitally prejudice competing interstate shippers. The state line affords no justification for compelling interstate carriers to grant such preference.

Of course, in order to constitute a rate preference, the difference in rates must be coupled with a showing of substantially similar transportation conditions; and, in turn, a rate preference, even as so established, is not necessarily undue. An accompanying showing, however, of a keen competitive situation in and of itself would seem to lend substantial support to a finding of "undueness."

It was shown and accepted as a fact that operating and transportation conditions throughout southern territory, except Florida, were similar and that there was no transportation reason for a different basis of rates within Georgia than on interstate traffic. (R. 256–259, 50, 51, 59, 110, 626, 682, 745.) [20]

[20] There was testimony to this effect and the parties, including the Georgia Commission, so stipulated. (R. 256–259.) Coupled with the fact that there was nothing to rebut this testimony and stipulation, it should be kept in mind that operating and transportation conditions in southern

With respect to the competitive situation, the General Traffic Manager of the Coast Line said:

> From one end of our railroad to the other end; we find on these commodities that the intrastate producers are competing with the interstate producers. For example, North Carolina stone moves into Virginia in competition with Virginia producers; Virginia stone and gravel moves into North Carolina in competition with North Carolina producers; North Carolina stone, gravel, and sand moves into South Carolina in competition with South Carolina producers; the South Carolina products compete with similar products from North Carolina and Georgia, and to some extent with Alabama, Tennessee, and Virginia; the Georgia producers compete with Alabama, Tennessee, South Carolina, North Carolina, and Florida, and so on. (R. 627.)

The Commission's report states that it is admitted by all "that there is keen competition between the respective producers and that interstate and intrastate shippers are in direct competition with each other"; (R. 95) and as bearing this out appellant Georgia Commission itself admits that there is "very keen competition between

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territory have of recent years been almost continuously before the Commission. *Southern Class Rate Investigation*, 100 I. C. C. 513, 128 I. C. C. 567; *Southern Fertilizer Investigation*, 113 I. C. C. 389; *Southern Cement Rates*, 132 I. C. C. 427, 155 I. C. C. 339; *Southeastern Sugar Investigation*, 132–477, 142 I. C. C. 459; *Brick & Clay Products in the South*, 88 I. C. C. 543, 155 I. C. C. 730.

the producers of all the materials at the principal markets, both inter and intrastate." (R. 772, 773.) In addition to the competition between materials of the same kind it was shown "that in the building of roads, clay gravel, crushed stone, slag, and washed gravel compete with each other, in that the choice of one for a particular project renders the use of the other practically unnecessary." (R. 17, 630, 772, 637.) The evidence in respect of one large interstate producer alone is that it is an active or potential competitor throughout the State of Georgia, maintaining a sales organization "which keeps in close touch with the work in the entire State of Georgia at a cost of about $20,000 a year." (R. 630.) Speaking of that producer, the Roquemore Gravel Company located at Montgomery, the Commission said:

> * * * In the past complainants' shipments to Georgia have been chiefly to Atlanta and points south thereof. Complainant now attempts, however, to market its products at all points in Georgia with the exceptions hereinafter noted. * * * Complainant does not attempt to do business at northern Georgia points, as it is unable to compete with northern Georgia stone producers because of the amounts of freight rate differences. With equality of both interstate and intrastate rate levels, however, complainant expects to be able to compete throughout the entire state of Georgia. (R. 102, 633, 635.)

As heretofore said, a rate difference, accompanied by a showing of similar transportation conditions, establishes preference and prejudice. The further showing of a keen competitive situation, in and of itself, would seem to furnish substantial support for a finding of "undueness," namely, of detriment resulting to one shipper by a lower rate accorded his rival under similar transportation conditions. There is evidence in this record that the lower rates given Georgia producers have caused interstate shippers to lose construction contracts (R. 726, 727, 724, 647) and, indeed, that they have altogether closed the Georgia market to some producers who had been doing business in the State (R. 639–641, 644). For example, a witness for the Ellenton Gravel Company (Ellenton, S. C.), testified:

> I would like to state that there have been one or two changes made in the rates that curtailed our business in Georgia quite a little but the changes made effective May 1st (1928) have put us out of Georgia. We had orders at that time and they wired us to cancel within 24 hours, and we have been out of the business since that time in Georgia. * * *
>
> I have been shipping to Georgia for nearly 20 years, but I am totally out of the State of Georgia now, and consequently my company has been suffering a loss, and we haven't done anything since May 1st. (R. 640, 641.)

But the Commission could hardly be accused of arbitrariness if the evidence, persuading it that rate preferences caused detriment, should fall short of showing "closed markets," or that failure to secure contracts was absolutely attributable to rate differences. (R. 631 to 636.) For example, the situation above shown, in respect of the business in Georgia of the Roquemore Gravel Company [21] may be divided into 3 parts. The Company is actually doing business at Atlanta and points south thereof. As to the balance of the State, it is attempting to do business at all points except in Northern Georgia. In Northern Georgia it expects to do business, "with equality of both interstate and intrastate rate levels." It can not be said that this company is subjected to undue prejudice only as to the portion of the state from which it is actually excluded.

The question as to whether rate prejudice is undue is not susceptible to precise proof; it is one of judgment, necessarily relegated to the administrative field. Standing alone, the evidence introduced by the Georgia Commission and its admissions go a long way toward affording substantial support for the Interstate Commission's finding of undue prejudice. Exhibit 161 B, introduced on behalf of the Georgia Commission, is a map of Georgia and adjacent states. There are shown in colors all the railroads in Georgia and those extending to

[21] This Company is a large-scale producer, enabling it to absorb rate differentials and reach distant markets even beyond Georgia. (R. 629, 635.)

Montgomery and Birmingham, Ala., Chattanooga, Tenn., and Columbia, S. C. There are also shown in colors the location of some of the principal producing points in Georgia of sand, gravel, and crushed stone. (R. 732.) In addition to this map there is the comparative statement introduced by the Georgia Commission showing distance rates, lower state than interstate, and finally its stipulation that its own investigation had shown very keen competition between the producers of all the materials at the principal markets, both inter and intrastate, the producers in Georgia coming in direct competition with the producers in Alabama, Tennessee, and South Carolina. (R. 772.)

Certainly the showing of undue preference and prejudice as between persons and localities made in this record is not, as in the *Wisconsin Railroad Commission Case, supra,* confined to typical instances at border points. The showing of competition blankets the State. And, as has just above been said with respect to the Roquemore Company, the Commission's administrative judgment that detriment results would not seem to be rendered arbitrary either because, on the one hand, a producer is still able to do business in parts of the State, or because, on the other hand, it is unable under the present rate adjustment to do business in other parts of the State.[22]

[22] Note that the Roquemore Company is doing business in States beyond Georgia under interstate rates established on the 17517 scale. (R. 635, 629.)

3. The Commission's findings in respect of undue preference and prejudice between persons and localities in state and interstate commerce are complete

Appellants attack the sufficiency of the Commission's findings of undue preference and prejudice as between persons and localities,[23] on grounds which appear to resolve themselves chiefly into the one complaint that the findings do not deal specifically with each discrimination resulting from each state rate. Appellants' brief sets forth the Commission's ultimate finding and some of the underlying findings, which need not be repeated here. It fails to mention the Commission's statement that—

> Exhibits were introduced by respondents showing the interstate rates from numerous *representative shipping points* to *representative destinations* in Georgia * * * rates from *representative Georgia origins* to the same points * * * and the amounts by which the said Georgia rates differ from the 17517 basis. The following data, taken from these exhibits and corrected to conform with our tariff check, are illustrative. (R. 96.) (Italics ours.)

The Commission then sets forth a table[24] of data illustrative of the rate disparaties shown by the

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[23] Often referred to as Section 3 findings to distinguish them from the finding of unjust discrimination against interstate commerce as a whole, the so-called revenue burden finding.

[24] Appellants do mention this table and, among other things, assert there is not a word of evidence to show actual

exhibits referred to. It thereafter points to a great deal of other evidence, some of which is corroborative or complementary and other of which is well nigh complete in itself. It states that circumstances and conditions affecting the intrastate and interstate transportation are substantially similar, (R. 100) but, as pointed out by appellants (Br. 59), it does not make specific finding of transportation conditions between each origin and destination intrastate as compared with transportation conditions between each origin and destination interstate. Neither does the Commission's ultimate finding of undue preference and prejudice attempt to state separately its determination in respect of each of the thousands of rate comparisons involved.

The decision in the *Florida Log Case*, 282 U. S. 194, repeatedly referred to by appellants, contains no holding that such findings are necessary—nor would they, in our opinion, be within the spirit and purpose of that decision.

a. Appellants' assertion that the findings of the Commission constitute "distance" the only element entering into transportation conditions is disputed by other of their own statements and argument.

Appellants point to the wording of the Commission's ultimate finding that state rates should be no lower "distance considered" than interstate

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movements. They overlook the fact that the rates are between "representative shipping points" and "representative destinations." And, in this connection, see list of shipping points stipulated by consent of parties. (R. 63 to 66.)

rates, and say "We assume these findings should be strictly construed." (Br. 62.) They submit to the Court "that a decision which bases a finding of unjust discrimination on distance, as a sole controlling factor, is arbitrary." (Br. 63.) But the preceding chapter of their brief points to underlying findings "that circumstances and conditions affecting state and interstate transportation are substantially similar," and that "there is no transportation reason" for a basis of state rates different than found reasonable interstate. (Br. 58 to 59.) The chapter under consideration concedes in substance that the report as a whole purports to make a distinction between single lines and joint lines. (Br. 62.) Must all this be repeated and in some way detailed in the ultimate finding and order of the Commission? If it were attempted, it would make for uncertainty rather than certainty. The soundness of, and necessity for, this Court's holding in *American Express Co.* v. *Caldwell*, 244 U. S. 617, that an order of the Commission should be construed together with its report, has been borne out in the Commission's every day work of constructing its reports and orders, and it would seem that such course could work no inequity as between the State and the carriers, or between shippers, state or interstate.

Moreover, appellants' argument to show that the Commission's findings should give recognition to transportation conditions other than distance ap-

pears to support the distinction made by the Commission between single and joint-line hauls. Yet the main difference[25] between the administrative judgment of the Georgia Commission and that of the Federal Commission is that no such distinction should be made, and the substance of appellants' position in this case is that there is no warrant for charging shippers, who are substantially the same distance from market as other shippers, somewhat higher rates because they happen to be located on joint lines. It is apparent that the federal commission has done just what appellants say it should do, namely, give consideration to operating and transportation conditions other than distance. In its judgment, on this low-grade traffic, the transportation service is substantially greater where the shipper has to employ two or more carriers in joint hauls than where he is able to reach his market by a single-line haul; and it gave effect to that judgment by prescribing somewhat higher rates for joint-line service.

It is obvious that where transportation conditions are the same, a shipper substantially more distant from market than a competitor must expect to pay a higher rate. Conversely, assuming that the distances involved are the same but transportation conditions substantially different, equally the

[25] This should be qualified by again calling attention to the fact that in seven of the gradations up to 200 miles the Georgia scale is lower than the Commission's. In 10 gradations it is the same.

shipper so situated as to require the additional service, must expect to pay a higher charge.

4. Appellants attack on the order, based on the assertion that it covers many state rates where the carriers do not participate in a corresponding interstate haul, is unsound in law and based on an assumed premise contrary to the general showing of record

Appellants contend that a carrier can not in law be found guilty of unjust discrimination unless it participates in the traffic both from the preferred point and from the prejudiced point, and assert that in countless instances the Georgia rates affected by the Commission's order "are over a railroad which does not maintain or participate in a corresponding interstate haul."

No instances are cited to bear out the assertion of facts. It must be kept in mind that the defendant carriers are all carriers engaged in interstate transportation; that the commodities involved constitute a large proportion of the carriers traffic in southern territory; that it was shown to move longer distances in that territory than in other territories; and that the Georgia Commission itself admitted that its own investigation had shown keen competition between the producers of all the materials at the principal markets both inter and intrastate. Furthermore, it is not clear just what is meant by appellants statement that there are countless instances where the railroads do not maintain or participate in a corresponding interstate haul. Road building may be undertaken at any time and

at any place. Do appellants mean that for a particular construction all hauls of a carrier were intrastate? Do they mean that over a particular period of time their hauls to certain destinations were all intrastate? Such distinctions would seem to be too fine-drawn to be permitted to defeat the plain purpose of the statute.

As stated in *St. Louis S. W. Ry.* v. *United States*, 245 U. S. 136, localities require protection against combinations of connecting carriers as well as against individual carriers. In *United States* v. *Illinois Central R. Co.*, 263 U. S. 515, equalized rates on lumber were maintained from a large blanket territory except that a somewhat higher rate was charged the Swift Lumber Company located in the same general territory, but on the Fernwood & Gulf Railroad, an independent connection of the Illinois Central. Upon complaint the Commission found that the Swift Lumber Company was subjected to undue prejudice, and it ordered the carriers to remove the prejudice by establishing and maintaining rates, on the one hand, no lower from the blanket territory than those contemporaneously maintained by them from points on the Fernwood & Gulf and, on the other hand, by rates no higher from points on the Fernwood & Gulf than those contemporaneously maintained by them from said blanket territory. The Fernwood & Gulf had a joint rate with the Illinois Central from points on its line, but it will be seen that, although it was found guilty of discrimina-

tion and ordered to establish rates no higher than those contemporaneously maintained from the preferred points, it did not participate in the traffic from the preferred points nor maintain or participate in any rate from the preferred point. Similarly, in *Wyoming Railroad* v. *United States*, 263 U. S. 515, 527, the Wyoming Railroad which was held guilty of discrimination against points on its line and ordered with the other carriers to remove same by charging no higher rates than those contemporaneously maintained from the preferred point, did not participate in the traffic from the preferred point nor maintain nor participate in the rates from the preferred point. It should be noted, too, that the Wyoming Railroad's participation in rates from the prejudiced points was only by way of its local rate in combination with rates of the Burlington.

It should be further kept in mind that in a section 13 (4) case such as this, where the interstate Commission has adjudicated the reasonable level of interstate rates and the carriers are petitioning for relief from lower rates imposed by state authority, the real source of responsibility for the preference and discrimination is not in any carrier or carriers but in the state. The preference and prejudice flows from a common source, namely, the state; yet the state controls only one branch of the fork of discrimination—the preferential state rates.

III. THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE COMMISSION'S ORDER "AS ONE NEEDED TO AVOID AN UNDUE BURDEN ON THE REVENUES OF THE CARRIERS

As pointed out above, an order of the Commission for removal of unjust discrimination caused by state rates may rest either upon the ground of undue prejudice against interstate shippers, or upon the ground of unjust discrimination against interstate commerce as a whole, that is, on the ground of disparity in intrastate rates which casts a burden on other commerce in maintaining the revenues of interstate carriers. *Wisconsin R. R. Comm. v. C. B. & Q. R. R.*, 257 U. S. 563, 586.

In this connection it should not be lost sight of that the first hearings and report of the Commission have a considerable bearing on this feature of the case. The tonnage figures and testimony there given showed the great and growing importance of this traffic to the carriers, due to the highway building programs of the states and other construction under way generally in the South. (R. 18, 28.) The keen competitive situation for the business was there shown and the fact that it had resulted in a distorted rate structure, the bulk of the traffic being handled by the carriers on so-called depressed rates. (R. 21, 28, 40.) The purpose of the wide general revision of rates there made by the Interstate Commission was to put an end to this chaotic condition. As said in its report:

> While we shall not prescribe minimum rates, we shall prescribe a scale which takes

> fully into consideration the very low values of these commodities and all characteristics, transportation and otherwise, which entitle them to relatively low rates. It will be a scale, in our opinion, from which the carriers ought not to depart. Departures could only have the result, ultimately, of forcing an unwarranted reduction in the general rate level on these commodities which would be burdensome to other traffic. (R. 109.)

The carriers, shippers, and other parties, generally speaking, were in hearty accord with the objective of the Commission. As aforesaid, the rates were subsequently voluntarily extended by the carriers interstate throughout most of southern territory and were widely adopted intrastate. (R. 91, 628.)

Following the different basis prescribed by the Georgia Commission, rates were established intrastate thereunder effective May 1, 1928. At the subsequent hearings further tonnage figures were introduced by trunk-line carriers, and, for a four-month period subsequent to May 1, 1928, figures illustrative of the burden imposed by the Georgia rates on revenues of carriers operating in Georgia. (R. 100 to 102.)

It was shown that the interstate basis, if applied to 2,342 carloads of this traffic which originated in Georgia on the Southern during said four-months' period, would have produced $12,000 more revenue than was produced by the Georgia rates.

(R. 667, 668.) This is equivalent to $36,000 computed on an annual basis. During the same period the entire Southern Railway System originated and delivered 12,817 shipments and participated in the joint movement of 14,977 shipments. During the four-month period 50,687 tons of the commodities originated at producing points in Georgia on the Seaboard Air Line and moved to destinations in Georgia. Charges were collected based on the Georgia scale. Such charges were $7,307 less than they would have been if established on the interstate basis, or about $22,000 computed on an annual basis. General tonnage figures were also introduced by the Seaboard showing, among other things, that during 1927 it had handled 5,213,183 tons of the materials which was equivalent to 25.5 per cent of its total tonnage. (R. 675.) The Seaboard also introduced estimates (based, however, on actual tonnage) showing that for a six-months' period ended June 30, 1928, the interstate basis would have produced approximately $8,000 more revenue than the Georgia rates on intrastate traffic moving from one point, namely, Highway Spur. (R. 677, 678.)

During the year 1927 the Georgia Railroad, Western Railway of Alabama, and the Atlanta & West Point handled 507,753 tons, 714,148 tons, and 397,380 tons of these commodities, which constituted 17.03, 29.99, and 20.78 per cent of the total tonnage handled by each, respectively.

For the Georgia Railroad it was shown that during the four-month period ended August 31, 1928, 100,515 tons of the traffic originated on its line in Georgia and moved to points in Georgia. The charges collected were shown to be $9,148 less than would have accrued on the interstate basis. This is equivalent to about $27,500 on an annual basis. (R. 101, 683, 684.)

The above illustrative mathematical data on traffic originated by important Georgia lines in and of itself shows substantial disparity. If extended to all intrastate traffic in which they participate and which is moved by other Georgia lines, the disparities shown would be correspondingly greater.

The Atlantic Coast Line did not introduce figures of this latter nature. "It is an important delivering but not an originating line in Georgia." (R. 627, 628.) However, its witness called attention to tonnage figures given at the first hearings (R. 625), and then said:

> I find that for the first eight months of 1928 the Coast Line handled 2,572,417 tons of these commodities, which represents 18.6 per cent of the total tonnage. During the same period of 1927 the Coast Line handled 3,517,513 tons, representing 22.7 per cent of the total tonnage handled. (R. 626.)

The difference in tonnage seems significant in connection with testimony of shippers above referred to that the 1928 Georgia rates had closed or

curtailed that market to interstate shipments. The 1928 figure, moreover, would include only four months after the new Georgia rates had been established. The Commission itself refers to the reverse situation—that is, of curtailed interstate movement from Georgia—and says:

> Testimony of various Georgia producers shows that prior to the going into effect of the prescribed interstate basis of rates these Georgia producers shipped extensively into Alabama, but that they are now marketing nearly all of their products within Georgia. This indicates that the differences between the interstate and Georgia intrastate rates have brought about a diversion of much of this traffic from interstate to intrastate channels. (R. 104–105.)

The diversion of the traffic to intrastate channels would mean, of course, that it would move under the lower state rates.

There was even testimony of certain Georgia shippers indicating that a reversion to the old conditions within Georgia was resulting, namely, of competitive rates depressed below the Georgia scale itself. (R. 104, 105.)

1. The Commission's finding on the revenue burden feature

Although lack of substantial evidence was urged before the Lower Court, there was no attack there made against the adequacy of the Commission's finding on the revenue burden feature, unless cer-

tain general allegations in the bill be regarded as such. (R. 1 to 11.) In this court appellant Georgia Commission asserts that the finding does not constitute compliance with the decision in *Florida v. U. S.*, 282 U. S. 194.

The Commission's ultimate finding on the revenue burden feature is in this case, just as in the *Florida case*, to the effect that intrastate rates result "in unjust discrimination against interstate commerce." This finding, however, when taken together with other statements and the context of the two reports, takes on an entirely different character than that which it has in the *Florida case*. The decision in the *Florida case* reads, at page 194:

> * * * There is a concluding clause that the intrastate rates result "in unjust discrimination against interstate commerce." This general statement in the language of the statute, neither standing alone nor taken in its context, could be regarded as sufficient to support a state-wide order from a standpoint of income, in the absence of supporting findings of fact as to the revenue from the traffic in question.

Furthermore, it will have been seen that, in the instant case, the revenue burden feature is only in part the same type as was involved in the *Florida case*, for an outstanding purpose of the Commission was to terminate rate war conditions, whereunder the bulk of the traffic, interstate as well as State, had been moving under depressed rates. Not

only was there the situation of Georgia rates lower than interstate rates, demonstrating a revenue burden which higher rates would relieve if shipments were not substantially curtailed, but, over and above that, there was the fact that the substantially lower state basis and uncontrolled competitive conditions would, and was, tending toward still lower Georgia rates, threatening the whole rate structure which, by the Commission's orders and the cooperation of other States and the carriers had become established over a wide territory.

The Florida decision had pointed to the fact that the Commission had established its basis of interstate rates in northern Florida only, whereas here the Commission has prescribed its interstate basis of rates throughout Georgia and a wide adjacent territory. This latter, taken together with its frequent admonitions, that since the maximum prescribed was low any departures therefrom would tend to break down the general rate structure and inevitably be burdensome to other commerce, must be regarded as markedly distinguishing the case from the Commission's report in the *Florida case*. Another distinguishing feature is the testimony by log producers in the *Florida case*, referred to by the court, to the effect "that any material increase in the Florida intrastate rates would either cause them to move their plants to the timber or abandon operations, and that in either event the carrier would lose considerable traffic."

There is nothing of this nature of record in the instant case. The only curtailment of intrastate commerce that was indicated was into the channels of interstate commerce, where, of course, it would yield revenue on the interstate basis. (R. 101, 102.)

The Commission stated what was shown in respect of revenue burden by the carriers' figures. The other evidence going to the context, that is, the evidence categorically mentioned by the Commission to support its revenue burden finding, has just above been set forth and need not be repeated. It should, however, be again emphasized that the interstate basis of rates had been prescribed for the purpose and with the hope of terminating the theretofore wasteful competitive conditions and of conserving the carriers' revenues. In this particular, as heretofore said, the revenue-burden feature of this case is in part of a type different from that to which the Florida decision is directed.

The Commission had stated in its first report:

> While we shall not prescribe minimum rates, we shall prescribe a scale which takes fully into consideration the very low values **of these commodities and all characteristics,** transportation and otherwise, which entitle them to relatively low rates. It will be a scale, in our opinion, from which the carriers ought not to depart. Departures could only have the result, ultimately, of forcing an unwarranted reduction in the general rate level on these commodities which would be burdensome to other traffic.

This was again repeated in its second report. (R. 109.) Also the Commission, after reviewing evidence of Georgia shippers that certain state rates were being depressed even below the Georgia scale, referred specifically to their contentions that if the low Georgia rates should be permitted to continue the result would be to disrupt the entire rate situation in other southern states. (R. 105.)

IV. THE ORDERS ATTACKED NEITHER OPERATE BEYOND THE AUTHORITY OF THE COMMISSION, NOR ARE THEY UNCERTAIN

The remaining contentions in appellants' brief appear to be relied upon to show that the Commission orders are invalid, both for uncertainty and because beyond its authority. They appear under several headings of the brief, but we believe that a simple discussion of the Commission's findings and orders and their purport will answer the contentions from every standpoint. The ultimate findings read:

> We further find that respondents' rates applicable to the intrastate transportation of sand, gravel * * * in carloads, between points in Georgia, *to the extent that they are lower,* distance considered, than the interstate rates contemporaneously applicable to the transportation of the same commodities between points in the State of Georgia, and from points in other States in southern territory, except Florida, to points in the State of Georgia, *not exceeding* the rates set forth in the appendix to this report and heretofore found and prescribed as reasonable in No. 17517 for the interstate transportation

of said commodities, in straight or mixed carloads, according as said respondents participate in said intrastate and said interstate transportation, result and will result in undue preference and advantage of shippers and receivers of freight in intrastate commerce within the said State of Georgia and in undue prejudice to shippers and receivers of freight in interstate commerce between points in the State of Georgia, and from points in other States in southern territory, except Florida, to points in Georgia, and in unjust discrimination against interstate commerce.

We further find that said undue preference and undue prejudice and unjust discrimination can and should be removed by the establishment, maintenance, and application to intrastate traffic between points in the State of Georgia of rates which shall not be lower, distance considered, than those contemporaneously applicable to the transportation of interstate traffic between points in the State of Georgia, and from points in other States in southern territory, except Florida, to points in Georgia, *not exceeding* the rates set forth in the appendix to this report and heretofore found reasonable in these proceedings for said interstate transportation. (R. 110, 111.) (Italics ours.)

Carrying out the latter finding the Commission's order reads:

It is further ordered; That said respondents, according as they participate in the transportation as aforesaid, be, and they are

> hereby, notified and required to establish, on or before March 3, 1930, and thereafter to maintain and apply to the intrastate transportation of sand, gravel * * * in carloads, between points in the State of Georgia, rates which shall not be lower, distance considered, than those contemporaneously applicable to the interstate transportation of the same commodities, in straight or mixed carloads, between points in the State of Georgia, and from points in other States in southern territory, except Florida, to points in the State of Georgia, *not exceeding* the rates set forth in the appendix to this report and heretofore found and prescribed as reasonable in No. 17517 for the interstate transportation of said commodities in straight or mixed carloads. (R. 115.) (Italics ours.)

The findings and order in the complaint case (No. 17763) are the same in the particulars involved in this discussion. (R. 111, 112, 115.)

1. The findings and orders operate only on State rates to the extent that they were lower than interstate rates

Appellants assert that the "Commission's order definitely and intentionally requires reductions in numerous state rates in Georgia." (Br. 26.) They speak of this frequently and also assume that the order purports to operate upon rates which were on the same basis as interstate rates.

But it will have been seen that the Commission's finding was that the intrastate rates *to the extent*

that they are lower, distance considered, than the interstate rates result in undue prejudice and unjust discrimination. And its further finding was that *said* undue prejudice and unjust discrimination should be removed by the establishment of rates which shall not be lower than the contemporaneously applicable interstate rates, that is, by the establishment of rates which it was to prescribe in its order. Naturally its order is to be read in conformity with the last-mentioned finding, that is, as being directed only against said lower state rates, which caused *said* undue prejudice and unjust discrimination.

As further disputing appellants' contention that the Commission's order intentionally requires reductions in State rates, it should be pointed out that only minimum rates are prescribed. What the carriers are required to establish intrastate are rates "which shall not be lower, distance considered, than those contemporaneously applicable to the interstate transportation of the same commodities, in straight or mixed carloads, between points in the State of Georgia, and from points in other states in southern territory, except Florida, to points in the State of Georgia, not exceeding the rates set forth in the appendix to this report and heretofore found and prescribed as reasonable in No. 17517 for the interstate transportation of said commodities in straight or mixed carloads."

Rates "which shall not be lower" than the contemporaneously applicable interstate rates alone

are prescribed. All words that follow are merely descriptive of the contemporaneously applicable interstate rates. The language is not as appellants describe it (Br. 12), that the railroads are to establish rates not lower than those contemporaneously applicable on interstate traffic, *and* not exceeding the scales of rates set forth in the appendix. The "and" is absent. It will be noted that, in the first finding (above quoted), to the effect that state rates result and will result in undue preference and unjust discrimination to the extent that they are lower than the contemporaneous interstate rates, the same language is used in describing the interstate rates. The Commission was there neither finding the state rates that should be established nor prescribing establishment of the rates. All that it was doing was to find that the state rates to the extent that they are lower than the interstate rates contemporaneously applicable, *not exceeding* the scales of rates in the appendix, result and will result in undue preference and prejudice and unjust discrimination.

The Commission's orders should, of course, be read together with its report (*American Express Co.* v. *Caldwell*, 244 U. S. 617, 626), and particularly together with the findings in the report.

The Commission's orders, then, operate only on the Georgia rates to the extent that they are lower than the interstate rates; and, even as to said rates, it prescribes only the minimum level, leaving the maximum level to the Georgia Commission. This

leaves certain Georgia rates on a higher basis than other Georgia rates, and than the interstate rates. To the extent that these higher state rates result in prejudice to certain state shippers as compared with other state shippers or interstate shippers, the Georgia Commission is the body to correct the situation and the Interstate Commission so recognized.

2. The words "contemporaneously applicable" in the order have been similarly used in other orders which have been before this court, and their meaning is that given them by the lower court

The meaning of the term "contemporaneously applicable" as appearing in the orders is, despite appellants' contentions to the contrary, that given to it by the lower court, namely, that the contemporaneously applicable interstate rates which are made the basis for state rates are "the rates now applicable and now maintained by the railroads."

As bearing this out reference is again made to the first finding of the Commission, above quoted. There the finding was that state rates to the extent that they are lower than the contemporaneously applicable interstate rates result and will result in unjust discrimination against interstate shippers and commerce. A finding of resulting unjust discrimination is, of course, a prerequisite to an order, and the Commission found that the state rates only to the extent that they are (now) lower than the contemporaneously applicable interstate rates result and will result in such unjust discrimination;

it made no finding that state rates to the extent that they may in future be lower than the contemporaneously applicable interstate rates results and will result in unjust discrimination. The sense in which the term "contemporaneously applicable" is manifestly used in this first finding of the Commission must, it would seem, be attributed to it throughout.

In any event orders of the Commission similarly phrased have been upheld by this Court, without exception being taken by the parties or the Court to the phraseology (*United States* v. *Illinois Central,* 263 U. S. 515, 518);[27] and, too, where state rates were involved. *Shreveport Case,* 234 U. S. 342, 346–347. In *State of Alabama* v. *United States,* 279 U. S. 229, the Commission's order involved was similarly phrased. In there holding that the lower court had not abused its discretion in denying an interlocutory injunction, the Court said at page 230 that "the order of the Commission is within its general powers."

3. The 4th Section relief granted by the Commission did not render its orders uncertain in meaning

As above shown, the Commission's orders prescribed state rates "which shall not be lower, distance considered, than those contemporaneously applicable" on interstate traffic. Speaking of the similar wording in the findings, appellants con-

[27] Such orders involving purely interstate commerce have been involved in numerous other decisions.

cede that although they do not specifically refer to joint-line and single-line hauls "other portions of the report and particularly the scales set forth in the Appendix" purport to make a distinction and rate difference between such hauls. (Br. 62.) A like reading of the order, together with the report, will be found to clear up each alleged uncertainty mentioned by appellants.

Appellants repeatedly cite instances where they assert that the rates contemporaneously applied interstate depart from the prescribed interstate basis, thereby, so they assert, making uncertain the interstate rates as a standard for state rates. But all are accounted for by the instructions for computing distances contained in the report and by the order granting relief from the 4th section of the Act, which will be hereinafter described. In prescribing its scales of rates for interstate application the Commission laid down the following rule for computing distances thereunder:

> In computing distances for the application of the foregoing rates, we find that the shortest routes shall be used over which carload traffic can be moved without transfer of lading. (R. 55.)

This means of course that, where there are several routes between origin and destination, the short distance route is the rate-making route. The varying distances over the other routes are plainly to be disregarded in computing their rates, that

is, their rates from such origin so served by competitive routes.

Referring to the above rule, the Commission said in its final report:

> We meant by that provision, and the respondents so construed it, that the shortest single-line route over which carload traffic could be moved without transfer of lading should be used in connection with the single-line scale, and the shortest joint route over which carload traffic could be moved without transfer of lading should be used in connection with the joint-line scale.
>
> In checking in rates under this formula the respondents found, of course, that the lowest rate between two points made in some instances over single-line routes while in other instances the lowest rate made over joint-line routes. (R. 107.)

The Commission then referred to its order granting 4th section relief and stated in substance that that was intended, not only to permit circuitous lines to meet the rates of the direct routes, but also to permit joint-line carriers to meet the rates of single-line carriers between the same origin and destination and still apply the joint-line scale from intermediate points. (R. 108.) In order to permit circuitous or joint-haul routes to meet the rates of the direct and lowest rated route and at the same time to maintain the scale rate, single-line or joint-line as the case might be, from intermediate points, relief had had to be granted from the clause of sec-

tion 4 of the Act, which forbids carriers, unless authority is first obtained from the Commission, to charge more for a shorter than a longer haul over the same route and in the same direction, that is, to charge more from an intermediate point on a line than from a more distant point to the same destination. Such relief was granted by a general order, which authorized the carriers in any routes (not circuitous beyond a named per cent) between any origin and destination to maintain the lowest rate applicable over any route between the same points, and to maintain higher rates, not exceeding the scale basis from, to, and between intermediate points. (R. 108.) The granting of 4th section relief in such cases is universal and obviously necessary unless the direct route is to secure all of the traffic.

So that it will be seen that at the time of the Commission's final order the situation was that, where there was carrier competition from an interstate origin to a Georgia destination, the lowest-rated route was sometimes a single-line haul and sometimes a joint-line haul, depending upon whether the lowest rate made over the one or the other. Under the scale rule, above quoted, the circuitous single-line route could meet the rate of the shortest single-line route between two points and the circuitous joint-line route could meet the rate of the shortest joint-line route between two points. Under the 4th section relief they could meet the

lowest rate between the two points whether made over a single-line or a joint-line route. For example, assume that a single-line carrier is itself the shortest single route between two points and yet a joint-line route is not only shorter but also rates made over it on the joint-line scale are the lowest, the 4th section orders permits the single line to meet the rate and share in the business and still maintain its scale rates from intermediate points. Conversely, the same is true in respect of a joint-line route which is itself the shortest joint-line route between two points.[1]

Naturally the direct-route rate as applied to the varying distances of all these competitive routes would produce countless distance bases of rates, and just as naturally it is apparent that such were not the "contemporaneously applicable" interstate rates which were made the bases for state rates. As to this very matter the Commission said:

> Much testimony and data were submitted on behalf of the Georgia commission and certain Georgia interests setting forth interstate rates applicable on this traffic over various routes between many points in this territory. This evidence is submitted to support the contention here made that carriers are maintaining numerous interstate rates on this traffic which are below

[1] The Commission's report makes altogether clear that the same freedom within Georgia is left with the carriers and Georgia Commission. (R. 108, 109.) And the lower court so held. (R. 170.)

> the level of the 17517 scales. An examination of this data discloses that with few exceptions the instances given are simply where different routes are, under the authorized fourth-section relief above referred to, meeting at competitive points the rates set by the rate-making route and applying at intermediate points the authorized scale basis. * * *
>
> The evidence in this case shows that with comparatively few exceptions, considering the extent of the territory covered, the carriers have checked in over the rate-making routes throughout the territory considered in the original proceedings interstate rates which are on the basis of the [fol. 123] 17517 standard-line scales. Carriers explain that the instances where such rates are off the approved basis are the result of errors which will be corrected.

Following this the Commission mentioned that there was evidence that certain of the weak short lines named in its first report were not assessing the 25 cents arbitrary which they had been authorized to charge in addition to the standard-line rates; and it then said that "summing up the situation, the evidence shows on the whole" that the carriers, in publishing the interstate rates, had conformed to the thought expressed in its first report to the effect that, while they were not prescribed as minima, yet since the nature of the traffic and other consideration had necessitated the prescribing of low maxima, such ought to be adhered to, for the establishing

of lower rates would inevitably force an unwarranted reduction in the general rate level on the traffic, which would be burdensome to other commerce. (R. 109.)

The exceptions from adherence to such maxima were, as above shown, inadvertent errors and the failure of certain weak short lines to assess the arbitrary which they had been authorized to charge in addition to the standard-line scales. The inadvertent errors were to be corrected. As to the failure of certain weak short lines to take their arbitrary the Commission said:

> Our findings and order herein, however, will automatically adjust themselves to situations where a short or weak line does or does not assess the arbitrary. (R. 109.)

Appellants' brief (Appendix II, XII) mentions two such weak lines in Georgia which are not charging any arbitrary interstate over the standard-line basis and ask what basis of rates shall be charged intrastate in Georgia to and from points on these and other so-called relief lines. The simple answer would appear to be that the order contemplates that where the arbitrary is not charged interstate so likewise it should not be charged intrastate.

The above excerpts from the report show, therefore, that while the interstate scales were prescribed only as maxima the Commission, before ordering that state rates be established not lower, distance considered, than the contemporaneously applicable interstate rates, had ascertained and

stated in its report that (with the exceptions above accounted for) interstate rates had been established at the maxima. Over the rate-making routes, whether single-line or joint-line, the full scale rates had been established. Although said rates, as applied to the competitive routes between the same points produced varying distance rates, the Commission's report could hardly make plainer than it does that such were not the contemporaneously applicable interstate rates referred to in its order. And from intermediate points on all such competitive routes the authorized scale rates had been established, whether single-line or joint-line as the case might be.

The necessity for territorial, rather than piecemeal adjustment of rates on particular commodities, has been heretofore explained. Considering the scope of the adjustment made in this proceeding, the orders are in fact peculiarly definite and certain. If appellants consider that particular situations require clarification, they can apply to the Commission, as suggested by the lower court. *Wisconsin R. R. Comm.* v. *C. B. & Q. R. R.*, 257 U. S. 570. (R. 167.)

Appellants complain of the distinction which, while permitting circuitous competitive routes to meet the rate of the direct route, yet prohibits a carrier operating from a different origin to lower its rates for competitive purposes. (Br. 113.) The distinction between competitive routes from the same origin to the same destination and competi-

tive routes from different origins is readily obvious. Rates made the same over routes of widely varying distances between the same origin and destination are universal. Familiar examples are the equalized fares over routes of varying distances between New York and Chicago and between Washington and Chicago. The principles permitting thereof are known to the court and sufficiently explained in the Commission's report.

CONCLUSION

The decree of the court below dismissing the bill should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930—No. 555

GEORGIA PUBLIC SERVICE COMMISSION, JAMES A. PERRY, ALBERT J. WOODRUFF, ET AL,
Appellants

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL,
Appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF ON BEHALF OF ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, ATLANTA & WEST POINT RAILROAD COMPANY, SEABOARD AIRLINE RAILWAY COMPANY, THE LESSEES OF THE GEORGIA RAILROAD, THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, CENTRAL OF GEORGIA RAILWAY COMPANY, ATLANTA, BIRMINGHAM & COAST RAILROAD COMPANY, SOUTHERN RAILWAY COMPANY

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Attorneys for the Carriers Mentioned

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PART ONE

JURISDICTION

The Court has found probable jurisdiction of this case.*

U. S. Sup. Ct. Repts., 75 L. Ed. 261.

STATEMENT OF THE CASE

THE MATTER INVOLVED

The Commission aptly states the question as follows (R. 107):

> "The real question here is whether the order of the Georgia Commission here considered has brought about an intrastate rate structure on this traffic within Georgia which, in its relationship to the approved Interstate rate structure has resulted and results in an unlawful situation which should be removed."

The Georgia Commission's order referred to is that of March 13, 1928 (R. 220).

The order of the Interstate Commerce Commission involved is dated December 9, 1929 (R. 113, Report begins R. 88),

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*The Interstate Commerce Commission's first report, dated Jan. 21, 1927, is found in 122 I.C.C. 133 (R. 12). Its order reopening the report and orders in the first report, dated June 4, 1928, is reported in 140 I.C.C. 85 (R. 86). The Commission's second report and order, dated Dec. 9, 1929, is in 160 I.C.C. 309 (R. 88). The first opinion of the United States District Court for the Northern District of Georgia, filed March 3, 1930, on interlocutory hearing (R. 163), is in 39 Fed. (2d) 169. The opinion of the same court on final hearing, filed July 5, 1930, (R. 168), is in 42 Fed. (2d) 467.

known as Docket No. 17517, embracing Docket No. 17763, in which the Interstate Commerce Commission fixed rates for intrastate transportation of sand, gravel (washed or unwashed), clay gravel, crushed stone and slag, in carloads, between points in the State of Georgia, which shall not be lower, distance considered, than those contemporaneously applicable to the interstate transportation of the same commodities, in straight or mixed carloads, between points in the State of Georgia, and from points in other states in southern territory, except Florida, to points in the State of Georgia, not exceeding the rates set forth in the Appendix to the report and theretofore found and prescribed as reasonable in No. 17517 for the interstate transportation of said commodities in straight or mixed carloads.

The same kind of order (included with the foregoing order) was issued to the defendants in No. 17763 (carriers by rail including those for whom this brief is filed) as to the same commodities, requiring that they maintain in the intrastate transportation of said commodities in Georgia rates which shall not be lower, distance considered, than the interstate rates contemporaneously maintained by said defendants on said commodities from Montgomery, Alabama, to the same destinations in Georgia, not exceeding the rates set forth in the Appendix to the report and theretofore found and prescribed as reasonable in No. 17763 for the interstate transportation by said defendants of the said commodities from Montgomery, Alabama, in straight or mixed carloads (R. 113). The Commission had previously in these proceedings, on January 21, 1927, fixed *interstate* rates in this territory on these commodities (R. 68). Those rates thus fixed were then in effect. The Commission had, as will be herein shown, left the Georgia rates to be adjusted by that Commission as a matter of comity, expressing the belief that the Georgia Commission would adjust its rates to conform to those fixed by the Interstate Commission (R. 59). The

Georgia Commission failed to make that adjustment. On the other hand, its order of March 13, 1928, accentuated the discrimination already existing.

THE DECREE APPEALED FROM

The decree appealed from was rendered on final hearing by the United States District Court for the Northern District of Georgia, organized as required by statute, dated June 24, 1930 (R. 172)—opinion dated July 5, 1930 (R. 168)—(42 Fed. (2d) 467). The two bills in this court had been consolidated (R. 159). The consolidated bill was dismissed. The decree on interlocutory hearing had denied an injunction March 3, 1930 (R. 168), (39 Fed. (2d) 169). The Court refused to restrain the Interstate Commission's order, either temporarily or permanently.

THE POINTS MADE BEFORE THE INTERSTATE COMMISSION IN DEFENSE OF THE GEORGIA PUBLIC SERVICE COMMISSION'S ACTION

The Interstate Commission found (R. 105-6) that the chief defenses offered for the action of the Georgia Commission in failing to authorize the application of the scales of rates prescribed by the Interstate Commission in Docket 17517 were:

> "(1) That there are various producing plants in Georgia that are so located that many destinations to which they ship or hope to ship are only reached by joint-line routes and it is desirable that such producing points should pay rates to such territory no higher than would Georgia plants having single-line hauls of approximately the same length to the same destinations in order to prevent discrimination between Georgia plants.
>
> "(2) That certain interstate shipping points would be able to reach various destinations in Georgia over single-

line routes and at lower rates than could certain competing Georgia plants. * * *

"(3) That it is not *now* the policy of the Georgia Commission to authorize joint-line differentials. (Italics added.)

"(4) That the scale prescribed by the Georgia Commission is reasonable and is better gradated than are the 17517 scales."

POINTS MADE BEFORE THE DISTRICT COURT IN DEFENSE OF THE GEORGIA PUBLIC SERVICE COMMISSION'S ACTION

The court below found that (R. 163-4):

"The only contentions of complaint [complainants] arising upon the face of this record which seem to us to be debatable are:

"1. That a full hearing was denied. * * *

"2. That the order did not stop with prescribing a maximum for interstate rates, but took over from State authority the general function of intrastate rate making on these commodities for the future.

"3. That the minimum sought to be prescribed is indefinite and uncertain.

"4. That as to rates above 200 miles the interstate rates are arbitrary and unreasonable, and themselves discriminate against the shorter hauls and other commerce."

On second hearing the court found that the fourth point was abandoned (R. 169).

CONTENTIONS OF THE CARRIERS

The rail carriers on behalf of whom this brief is filed contend that the case was submitted to the Commission on agreement

that operating and other transportation conditions on standard lines throughout the territory involved are sufficiently similar to warrant a uniform rate level upon the commodities mentioned (R. 51) and that the Commission first fixed interstate rates reasonable for the entire territory, contemplating that they would be uniformly adopted, and refrained from making intrastate rates in Georgia on the theory that the Georgia Commission would cooperate and adopt the same scale. The Georgia Commission by its order of March 13, 1928 (R. 79, 220), prescribed rates which did not conform to the Interstate Commission's rates, but increased the discrimination.

Thereupon, after proper notice and hearing, the Commission prescribed for Georgia intrastate transportation the same rates, or rates on the same bases, distance considered, which it had previously prescribed for interstate shipments.

The carriers also contend that neither one of the points mentioned by the Interstate Commission as having been made by the Georgia Commission, above set out, offers any reason why the Interstate Commission should not have prescribed intrastate rates in Georgia for the transportation of these commodities.

Each point made by the State Commission is consistent with the proposition that there should be uniform rate structures for the commodities involved, interstate and intrastate, in Georgia and surrounding territory. The points made by the Georgia Commission are to the effect that the scale proposed by them for this uniformity is better than that prescribed by the Interstate Commission.

The carriers also contend that the points made by the Georgia Commission before the District Court are likewise entirely consistent with the position that there should be a uniform rate level in the southern territory, including Georgia, on the commodities mentioned, but that the Georgia Commission prefers its method

of making this uniformity and insists upon its system as against the system prescribed by the Interstate Commerce Commission; that is, the Georgia Commission has proposed one level of rates to remove the discrimination produced by the relation of the inter and intrastate rate, and the Interstate Commission has ordered another. The direction of the Interstate Commission in such circumstances is supreme.

The carriers further contend that, independently of the method of submission of the case, the findings of the Commission of unjust discrimination against persons and places and traffic and against interstate commerce, worked by the intrastate rates of the Georgia Commission for the carriage of the commodities involved by its order of March 13, 1928, are supported by adequate evidence and that the said findings and evidence sustain and require the orders entered by the Commission, and that the decree of the lower court was and is correct and should be affirmed.

THERE WERE TWO BILLS IN EQUITY

There were two bills filed in this proceeding—one by Georgia Public Service Commission and its members against the United States and the Interstate Commerce Commission, known as No. 563 (R. 1); and the other by the State Highway Board of Georgia, the Commissioners of Roads and Revenues of Fulton County, the City of Atlanta, and certain individuals (R. 148). These two bills are to the same purport and are often in the same language. On March 1, 1930, the latter case was consolidated into the first—No. 563 (R. 159), and the litigation proceeded as one case under the title of case No. 563.

ORIGIN OF THE PROCEEDINGS

The proceedings were instituted by the Commission upon petition of the several railroads operating in the State of Geor-

gia (R. 14, 188). The prayer of their petition was to the effect that the Commission proceed to enter upon an investigation, as provided in paragraph 3 of section 13 of the Interstate Commerce Act, with reference to the rates upon the commodities here involved, and after investigation to enter such order as is provided in paragraph 4 of section 13 of the Interstate Commerce Act as would effect a removal of the undue prejudice then existing. The carriers claimed that the rates prescribed by the Georgia Public Service Commission in its order of February 25, 1925 (R. 200), on the commodities in carloads for intrastate application between points in Georgia and then in effect gave an undue and unreasonable advantage, preference and prejudice as between persons and localities in intrastate commerce in Georgia, on the one hand, and persons and localities in interstate commerce, on the other hand, and were unjustly discriminatory against interstate commerce and placed an undue burden on interstate commerce in violation of section 3 and section 13, subdivisions 3 and 4, of the Interstate Commerce Act.

The Interstate Commission, on October 5, 1925, ordered the investigation petitioned for by the carriers (R. 204).

The Commission, after proper notice to the carriers and to the Governor of Georgia and to the Georgia Public Service Commission (R. 14-15), proceeded to make the investigation covering the entire territory defined as southern territory. That term as used in the report includes, roughly, the territory east of the Mississippi River and south of the Ohio River and the line of the Norfolk and Western Railroad from Bristol, Tennessee-Virginia, to Norfolk, Virginia. It does not include the eastern corner of Kentucky served by the Chesapeake & Ohio. It is the territory in which freight rates are generally governed by the Southern classification (R. 16).

The Commission made its report on January 21, 1927 (R. 12), and entered its orders on that date (beginning R. 68). The order fixed rates for *interstate* transportation of sand, gravel (washed or unwashed) and clay gravel in straight or mixed carloads from Montgomery, Alabama, and Chattanooga, Tennessee, respectively, on the carriers' lines in Georgia and Mississippi, and on gravel (washed or unwashed) and clay gravel in straight or mixed carloads from the same points of origin to destinations on the carriers' lines in Georgia and Mississippi, and fixed rates on all of the commodities mentioned in straight or mixed carloads between points in the State of Georgia and between points in the State of Georgia and points in other states in southern territory as hereinabove defined, except Florida. The order did not provide rates for intrastate transportation in Georgia. On the other hand, the Interstate Commission said (R. 59):

> "We have been impressed with what appears to us to have been the broadminded attitude taken by the Georgia Commission when it undertook the revision of these rates, which resulted in its order of February 25, 1925. This order, as we have seen, resulted in raising many depressed intrastate rates applying between important producing and consuming points, and subsequently had the effect of bringing about substantial increases in important depressed interstate rates. Considering the results brought about by this order, it could not be found from this record to have brought about a rate situation which has in the past been unjustly discriminatory against interstate commerce. We are, however, in these proceedings approving a distance scale of rates for application alike to the interstate transportation of all of the commodities here considered. *There is, of course, no transportation reason for the maintenance of a different basis of intrastate rates on these commodities within Georgia than that herein found reasonable for interstate transportation.* However, in view of the attitude taken by the Georgia Commission in the past, which we have above adverted to, we do not now deem it necessary

to make any finding or enter any order in No. 17517 for the future, in so far as unjust discrimination against interstate commerce is there involved, because it is felt that the Georgia Commission will co-operate in authorizing such revisions as may be necessary to bring their rates into harmony with the interstate adjustment herein approved." (Italics added.)

THE PETITION OF CARRIERS TO THE GEORGIA COMMISSION

The carriers operating in Georgia filed their petition with the Georgia Commission requesting that Commission to authorize the establishment of the rates fixed by the Interstate Commission in its No. 17517 for intrastate application in Georgia. Hearings were had on this petition and on March 13, 1928, the Georgia Commission issued its order refusing to authorize the application of these scales within Georgia, but directed the carriers to establish on May 1, 1928, a scale of rates differing from both its own scale fixed in 1925 and from the Interstate scale fixed by the Interstate Commission's said order of January 21, 1927. Those latter rates became effective in Georgia on that date as ordered (R. 92).

Thereupon, the Georgia carriers, under date of April 12, 1928, filed their supplemental petition with the Interstate Commission (R. 211), representing the facts above set out and setting up the Georgia Commission's order of March 13, 1928 (R. 220), and praying that the proceedings be reopened; that further investigation be held by the Interstate Commission with reference particularly to the rates prescribed by the Georgia Public Service Commission in its order dated March 13, 1928; and that such orders as might be necessary or appropriate be entered by the Interstate Commission to remove the discrimination worked thereby (R. 92, 211).

The Interstate Commission reopened No. 17517 (R. 240) for further hearing for the sole purpose of determining whether the rates and minimum weights required by the aforesaid order of the Georgia Commission to be maintained by the respondent rail carriers on intrastate shipments within Georgia of the commodities involved in relation to their interstate rates and minimum weights prescribed by the Interstate Commission in its order of January 21, 1927, cause or will cause any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate commerce or foreign commerce, on the other hand, or any undue, unreasonable and unjust discrimination as against interstate or foreign commerce (R. 92). Likewise the proceeding in No. 17763 was reopened to the same extent and for the same purposes (R. 242). This involved the rate structure on sand, gravel (washed or unwashed), clay gravel and crushed stone from Montgomery, Alabama, and Chattahooga, Tennessee, to destinations in Georgia.

After a lengthy hearing in which a great deal of evidence was taken, both by way of exhibits and oral testimony, the Commission made its report of December 9, 1929 (R. 88), and its order of the same date (R. 113), fixing a single line scale of rates and a joint line scale of rates. After fixing these rates the order provided (R. 117) that when transportation is in whole or in part over either of the so-called short lines, as set out in Appendix B to the original report (R. 67), the rate set forth in Table A (R. 117) plus an arbitrary of 5 cents per net ton to accrue solely to the short line might be applied.

The Commission in its report rendered on December 9, 1929, found that the rates of the carriers on the commodities mentioned between points in Georgia, in carloads,

> "to the extent that they are lower, distance considered, than the interstate rates contemporanebusly applicable to

the transportation of the same commodities between points in the State of Georgia, and from points in other states in southern territory, except Florida, to points in the State of Georgia, not exceeding the rates set forth in the Appendix to this report and heretofore found and prescribed as reasonable in No. 17517 for the interstate transportation of said commodities, in straight or mixed carloads, according as said respondents participate in said intrastate and said interstate transportation, result and will result in undue preference and advantage of shippers and receivers of freight in intrastate commerce within the said State of Georgia and in undue prejudice to shippers and receivers of freight in interstate commerce between points in the State of Georgia, and from points in other states in southern territory, except Florida, to points in Georgia, and in unjust discrimination against interstate commerce." (R. 110).

The same kind of finding was made in No. 17763 (R. 111).

The following table (R. 94) illustrates the differences between the standard line scale of rates fixed by the Interstate Commission in No. 17517 and which the Interstate Commission prescribed for Georgia, on the one hand, and the rates, single line and joint line, fixed by the Georgia Commission in its order of March 13, 1928 (R. 94).

	SINGLE LINE			JOINT LINE		
Miles	I.C.C. Docket 17517 Cents	Georgia Comm. Order 3-13-28 Cents	Differences Cents	I.C.C. Docket 17517 Cents	Georgia Comm. Order 3-13-28 Cents	Differences Cents
10	50	50	..	65	50	*15
20	55	55	..	70	55	*15
30	60	60	..	75	60	*15
40	70	70	..	85	70	*15
50	80	70	*10	95	70	*25
60	80	80	..	95	80	*15
70	90	80	*10	105	80	*25

80	90	90	..	105	90	*15
90	100	90	*10	115	90	*25
100	100	100	..	115	100	*15
110	110	100	*10	125	100	*25
125	110	110	..	125	110	*15
130	120	110	*10	135	110	*25
150	120	120	..	135	120	*15
160	130	120	*10	140	120	*20
175	130	130	..	140	130	*10
190	135	130	* 5	145	130	*15
200	135	140	‡ 5	145	140	* 5
220	140	140	..	150	140	*10
230	140	150	‡10	150	150	..
250	150	150	..	160	150	*10
260	150	160	‡10	160	160	..
280	160	160	..	170	160	*10
290	160	170	‡10	170	170	..
320	165	170	‡ 5	175	170	* 5
360	175	180	‡ 5	180	180	..
400	185	190	‡ 5	190	190	..
440	195	200	‡ 5	200	200	..
460	205	210	‡ 5	210	210	..

*Georgia Public Service Commission Scale lower than 17517 scale.
‡Georgia Public Service Commission Scale higher than 17517 scale.

DIFFERENCES BETWEEN THE TWO SCALES

Joint Line Differential

The differences between these two scales of rates may be stated as follows:

(a) The Georgia Commission's single line rates and its joint line rates are the same; that is, the Georgia Commission made no joint line rates.

The single line rates of the two Commissions are the same up to 50 miles, when the Georgia Commission's rate becomes 10 cents per ton less than the Interstate Commission's single line

rate. At 70 miles, at 90 miles, at 110 miles, at 130 miles, at 160 miles, the Georgia Commission's rate is ten cents less than the Interstate Commission's single line rate; at 190 miles and at 200 miles, it is 5 cents per ton more than the Interstate rate. These blocks, wherein the Georgia schedule of rates is made lower than the Interstate scale, fit movements from Georgia producing points to Georgia extensive consuming points and thus accentuate the discrimination between the two scales of rates. Then the Georgia rates from 200 miles to 460 miles are either uniform with, or from 5 to 10 cents per ton in excess of, the Interstate rates. In nine instances the Georgia rate is in excess of the Interstate rate over 200 miles. In three instances the rates are equal.

The Georgia scale is almost uniformly less than the Interstate joint line scale. At 230 miles the two scales are the same; they are the same at 290 miles; they are the same at 320 through 460 miles.

The fact that the Georgia Commission's order of March 13, 1928, prescribed one line of rates to be applied, whether one or more than one carrier hauled the freight, whereas the Interstate Commission prescribed a single line scale and also a higher joint line scale, is a very important difference between the two Commissions. The Georgia Commission, in its order of February 25, 1925, which was in effect when the Interstate Commission's order of 1927 was made, fixed single line scales and joint line scales (R. 200-203). In each instance the joint line scale thus fixed by the Georgia Commission was higher than the corresponding single line scale up to 100 miles, and after that the Georgia Commission's rates became in effect one scale.

The Interstate Commission found that (R. 95):

> "The evidence indicates that practically all of the intrastate movements of this traffic within Georgia are less than 200 miles."

The Georgia Commission's order is so framed that it provides lower rates on the hauls used by the Georgia producers and higher rates on those used by the Interstate producers.

In its first report the Commission found (R. 52):

> "In the case of the commodities under consideration, however, there is perhaps more basis for joint line arbitraries than in the case of any other form of traffic. The very low value of these commodities makes the cost of transportation a most vital matter, and it may well be that even the slight increase in rate level over the single line routes, which the elimination of joint line arbitraries would entail, ought to be avoided. Undoubtedly the greater proportion of this traffic moves over such routes. At all events, we have reached the conclusion that in the case of these commodities joint line arbitraries may reasonably be permitted, but should be of lesser amounts and disappear at an earlier stage of the scale than the carriers propose."

It is apparently admitted that joint line carriage is entitled to a higher rate than single line transportation. It is also apparently conceded that in the event one rate is to apply to both joint and single line transportation, it should be higher than for ordinary single line transportation, in order that the carriers may thus have compensation for the extra cost of the joint line transportation (R. 346, 348).

We have just seen that the Georgia Commission recognized the propriety of an increase in joint line traffic up to 100 miles in its order of 1925, and that it departed from that principle in its order of March 13, 1928.

In dealing with this subject the court below in its final opinion (R. 171) said:

> "As we said in Alabama vs. United States, just decided, there are sound reasons for saying that there is extra cost in handling a car over a joint line and this extra cost is

most important to the carriers in this lowest rates. Whether compensation for the extra cost shall be had in a separate joint scale of rates or in a slightly higher average of rates is within the competency of the Commission to decide."

ARBITRARIES TO WEAK LINES.

(b) The second point of difference between the two Commissions is that the Interstate Commission's order allows (but does not require) an arbitrary not in excess of 25 cents per ton of 2000 pounds for certain roads which are named in the orders or which are set out in Appendix B to the first order (note pages 72, 74, 84 of the record).

The Georgia Commission's order of March 13, 1928, allows (but does not require) an arbitrary for Class B roads of ten (10) cents per ton (R. 82 and 83, columns 4 and 5).

The Interstate Commission's power, of course, extended to this question of arbitraries to the weak lines.

MILEAGE

(c) The third departure of the two Commissions is in the method of ascertaining mileage. The Interstate Commission's report provided as follows (R. 107):

"The original report in these proceedings provided that in computing distances for the application of the 17517 scales the shortest routes shall be used over which carload traffic can be moved without transfer of lading. We meant by that provision, and the respondents so construed it, that the shortest single line route over which carload traffic could be moved without transfer of lading should be used in connection with the single line scale, and the shortest joint line route over which carload traffic could be moved without transfer of lading should be used in connection with joint line scale."

The Commission by a Fourth Section Order provided for transportation where there are several routes not circuitous beyond a fixed per cent., so that each route might have the same rate as the lowest over any route, joint or single, by which carload freight might move without transfer of lading. The Commission also provided for the maintenance of the scale of rates to intermediate points on indirect routes. The Fourth Section Order issued by the Commission is set out in Appendix No. 1 hereto.

Under the broad power contained in Section 13, subsections 3 and 4 of the Act, all of the orders herein made were within the power and jurisdiction of the Commission upon a proper case for the removal of discrimination under Sections 3 and 13 of the Act.

COMPETITION

One of the controlling matters in determining whether this low grade traffic should have a joint line and single line rates is competition. The Commission found that:

> "The record as made shows the existence of a keen competitive situation in the production and sale of these commodities and calls for a consideration of the rates on them throughout a substantial part of southern territory" (R. 16).

It also found:

> "The record leaves no doubt of actual and active competition between all of these commodities, except possibly sand" (R. 17).

The Commission again refers to the competitive situation at page 20. Again at page 31 it refers to competition in sand and gravel.

The Commission finds, at pages 52 and 53, that the commodities, as we have said, are of unusually low value.

At page 95 of the record, the Commission in its second report held:

> "That there is keen competition between the respective producers and that interstate and intrastate shippers are in direct competition with each other is admitted by all. The producers in Alabama, Tennessee, and South Carolina come in direct competition with producers in Georgia."

The Georgia Commission found that their investigation showed very keen competition between the producers in interstate and intrastate markets (R. 79).

The Commission, at page 106, stated that most of the interests represented in the first hearing advocated the prescription of joint line arbitraries, adding:

> "The fact is we have never prescribed for general application in any territory one scale for both single line and joint line hauls of this traffic."

The Commission, in its second report, held (R. 170):

> "Because of the close competition and the large figure which the rate cuts in the price of the commodity here involved, slight additions in the rate are found to affect vitally the business done. Hence the necessity, from the standpoint of shippers, of substantial equality between the rates under similar circumstances, to prevent discrimination between intrastate and interstate commerce."

In its order of March 13, 1928, the Georgia Commission found that (R. 79):

> "The investigation which we have made shows very keen competition between the producers of all these materials at the principal markets, both inter and intrastate, the producers in Georgia coming in direct competition with pro-

ducers in Alabama, Tennessee and South Carolina. In our opinion, to approve the gradation of the scale prescribed by the Interstate Commerce Commission would work great injury and damage to shippers and carriers on Georgia intrastate traffic, and for that reason we are prescribing a revised scale in order that all interests may be preserved."

The Interstate Commission approved the rates for single and joint line hauls in the case of Sand and Gravel from Stations on the C. & W. C. Railway, 83 I.C.C. 436, decided October 27, 1923.

It was, of course, within the jurisdiction of the Interstate Commission to prescribe such rates, fares, charges, classifications, regulations and practices as might be necessary in its judgment to remove the discrimination complained of (Section 13, paragraph 4 of the Act).

THIS CASE WAS SUBMITTED TO THE INTERSTATE COMMISSION BY ALL PARTIES ON THE BASIS THAT THE COMMISSION SHOULD FIND A PROPER UNIFORM SCALE

Uniformity of Conditions

We contend that this case was submitted to the Interstate Commission by common consent of all parties to the record, especially including Georgia Public Service Commission, upon the premise that there should be uniformity of rates on these commodities throughout the southern territory and that the conditions in that territory were "sufficiently similar to warrant a uniform rate level on these commodities" (R. 51).

We further contend that, being thus submitted, it was in fact presented to the Commission for the determination of what scale of rates should be used for uniform application throughout the southern territory, which, of course, includes the State of

Georgia. The subject was submitted to the Commission by all parties concerned upon the basis that the conditions were at hand to justify the finding by it of the proper level of rates for uniform application.

The Commission found in its first report as follows (R. 51):

> "As has been indicated, there is quite general agreement of both shippers and carriers that operating and other transportation conditions on standard lines throughout the territory here involved, with the exception of the Florida peninsula, *are sufficiently similar to warrant a uniform rate level on these commodities.*" (Italics added.)

The Commission then states:

> "This was the conclusion that we reached with respect to all of southern territory, other than the Florida peninsula, in Southern Class Rate Investigation, supra, (100 I.C.C. 503) and also in Brick and Clay Products in the South, 88 I.C.C. 543, and Fertilizers between Southern Points, 113 I.C.C. 389. In those proceedings no distinction was sought in rates as between branch lines and main lines, and none is sought here. *We are of the opinion that there should be a uniform rate level upon the commodities in issue over standard lines within the territory involved,* excepting the Florida peninsula. The special contention of the Louisville & Nashville that higher rates are justified upon its lines between Etowah and Marietta is hereinafter considered." (Italics added.)

At page 32 the Commission found:

> "*The complainants and the Georgia Commission advocate uniform scales, but propose a lower scale for certain of these commodities than for others. The Georgia Commission advocates its present scales as reasonable for application throughout the territory here considered.*" (Italics added.)

The persons referred to as the complainants in this case are the shippers who had filed complaints, as in Nos. 17699 and

17699 Sub. No. 1, Roquemore Gravel Company and Alabama Sand and Gravel Company; in Nos. 17763 and 17689, Roquemore Gravel Company; and in Nos. 17764 and 17764 Sub. No. 1, Dixie Sand and Gravel Company.

At Record 256 Commissioner Lewis submitted certain questions to all the parties. No. 6 was:

> "Is it agreed that the operating and transportation conditions throughout the general territory here involved are similar?"

The parties who had entered their appearance answered (R. 259):

> "Yes, except as to the Peninsula of Florida, as to which it is agreed that exceptional treatment is justified, and except as to short lines, the Louisville & Nashville Railroad reserves the right to make a showing in behalf of the Louisville & Nashville Atlanta Division Old Line."

We are not concerned in this case with the peninsula of Florida.

In its second report the Commission found (R. 110):

> "Upon brief filed in this proceeding on behalf of the Georgia Commission it is stated:
>
> " 'The Georgia Commission has not claimed, and is not here claiming that there should be a different basis of rates on intrastate commerce in Georgia than on interstate traffic into Georgia and out of Georgia or across Georgia. It is simply the position of the Georgia Commission that the rates required to be maintained by its order and the rates now in effect within the State of Georgia are just and reasonable rates, sufficiently remunerative to the carriers, and not discriminatory against or prejudicial to interstate commerce or preferential to state shippers.'
>
> "As heretofore stated, we found in the original report that there is no transportation reason for the maintenance

of a basis of intrastate rates on these commodities within Georgia different from that there found reasonable for interstate transportation.

"We find that the circumstances and conditions affecting intrastate transportation within Georgia and interstate transportation between points in Georgia, and from points in other states, in southern territory, except Florida, to points in Georgia, are substantially similar."

At page 105 of the record the Commission stated that:

"They (certain shippers) urge the establishment of a uniform basis of rates for application to both intrastate and interstate traffic, and *counsel for these producers urges on brief that this uniformity should be here accomplished by placing the intrastate rates on the approved interstate level.* It is argued that if the rates on this traffic within Georgia should here be permitted to continue on a lower level than the interstate basis the result will be to disrupt the entire rate situation in other southern states." (Italics added.)

The Georgia Commission's scale of March 13, 1928, which is under attack in the second order of the Commission, was not defended on the ground of lack of uniformity of conditions. The grounds upon which these rates were defended in the Commission and in the court have been set out at page 4 hereof. (See R. 105, 106 and 163-4.)

It will be noted that each one of these defenses urged by the Georgia Commission before the Interstate Commerce Commission and before the court is consistent with the Georgia Commission's position previously quoted that the rates on these commodities should be uniform throughout the territory called in these proceedings southern territory and hereinbefore defined.

On the subject of uniformity of rates throughout the territory, Mr. E. M. Price, Rate Expert of the Georgia Commission,

testified beginning at page 599 of the record. At page 602 he said:

> "As I have already stated, a very careful study was made, not only of the rates existing in Georgia, but throughout this territory, and in prescribing these rates the Georgia Commission feels that they are responsible, not only for Georgia intrastate application, but could well be used as a measure for interstate application throughout the Southern Territory."

At page 607 the witness said:

> "As I stated in the beginning of my testimony, the Georgia Commission feels its responsibility to the carriers in Georgia, and in making the revisions, which have already been accomplished, the Commission has endeavored to prescribe rates that would be reasonable throughout the territory, regardless of the effect of the Georgia interstate (intrastate?) situation," etc.

At page 608 the witness testified:

> "Now, Mr. Commissioner, with regard to the charge that the Georgia rates discriminate against interstate commerce, we do not deny that there are some rates applying interstate into Georgia that are higher than the Georgia scale and this is illustrated by my exhibit (Exhibit No. 244), but it must be remembered that prior to the effective date of the Georgia rates there were a great many interstate rates into Georgia much lower than the Georgia rates, which would have created violent discriminations against Georgia if they had not been brought up to the level of the Georgia rates, and further that the carriers in making their interstate revision only revised such rates as were lower than the Georgia scale and, so far as we know, made no revision of their rates that happened to be higher than the Georgia scale."
>
> "The Georgia scale represents as nearly as practicable a general level of what might be considered as the going

rates on these materials in the Southern Territory, and as applied to Georgia traffic represent material increases in carriers' revenues, and in our opinion if applied inter and intrastate throughout the Southern Territory, would cause increases in revenues."

We have heretofore quoted from the Georgia Commission's order of March 13, 1928 (R. 222), to the effect of the keenness of competition, both interstate and intrastate, for the commodities involved, and that the Georgia producer comes in direct competition with the producers in Alabama, Tennessee and South Carolina. It is quite apparent from this order that the Georgia Commission proceeds upon the theory that there should be uniformity of rates, but the Georgia Commission claims that (R. 223):

"Should we approve the joint line differentials for application intrastate in Georgia which have been approved by the Interstate Commerce Commission for interstate application in Docket 17517, it would result in discrimination between the producers of these materials within the State of Georgia, and would place the producers in Georgia at a great disadvantage with their competitors in the States of Alabama and Tennessee, this condition being brought about on account of the location of the producing plants in Georgia, and the necessity for joint line movement to points of consumption that are reached by single line movement from producing points in other States. The rates which we are approving in the following Order, in our opinion, are just and reasonable, and will not be preferential to Georgia producers, or result in undue discrimination against interstate producers."

Mr. Price, Rate Expert of the Georgia Public Service Commission, testifying for the Commission, introduced his exhibit No. 244, which had many sheets covering many kinds of comparisons of rates and clearly showing that the purpose of the Georgia Commission was not to avoid uniformity of rates, inter-

state and intrastate, but to insist upon the Georgia Commission's method of procuring that uniformity as against the Interstate Commission's method of procuring it, and it is our contention that this case was submitted to the Commission on the theory that if there were not uniform rates throughout what is called the southern territory, unjust and unreasonable discrimination would be worked and that that premise being admitted, the Georgia Commission insisted that its method of producing that uniformity was better than the Interstate Commission's method, and the Interstate Commission insisted that its method was better than the Georgia Commission's method. So that the case was a contest, based upon premises in which all parties admitted the necessity for uniform rates and that the absence of uniform rates would work unjust and unreasonable discrimination of the kind relievable by the Interstate Commission under sections 3 and 13 of the Act. In that contest one or the other of those Commissions had to be supreme. The Interstate Commission, in such circumstances, was, of course, under the decisions, supreme. The purpose of the Georgia Commission is stated in its order of March 13, 1928 (R. 222), where the Georgia Commission said:

> "We are in accord with the views of the Interstate Commerce Commission that the intrastate rates should not cause undue discrimination against interstate commerce, neither should interstate rates result in undue discrimination against intrastate commerce, and with this end in view, it is the purpose of this Commission to prescribe such rates as will permit of free movement and competition both inter and intrastate."

We construe that as an admission of the need of uniformity of rates; a statement that a rate system was necessary which would "permit of free movement and competition both inter and intrastate." We must bear in mind that this is the statement

of the State of Georgia and that it was putting its case on that basis.

This is somewhat emphasized by the fact that in the order of February 25, 1925, and repeated in the order of March 13, 1928 (R. 220), is a provision to the effect that:

> "In no instance shall the rates on the commodities covered by this order be higher, between any points in Georgia than the interstate rates contemporaneously in effect on the same commodities between points in Georgia and points in other States, for the same or greater distance, over the same line or lines, the haul between the Georgia points being included in the longer interstate haul."

The Georgia Commission was thus using the Interstate rate, fixed by the Interstate Commission in 17517, as the maximum standard of rates on these commodities.

When we consider the findings as to keenness of the competition between markets, the many points of production of the commodities, the competition of the commodities between themselves, the lowness of their price, that slight variations in rate charges control the market, and that the Georgia rates were admittedly lower in many instances than the Interstate rates which had been previously provided in No. 17517 and which were then in effect, it will appear that the Interstate Commission's findings, intermediate and final, were not only justified but demanded.

QUANTITIES, REVENUES AND VALUES

QUANTITIES AND REVENUES

The Commission found that exhibits submitted showed that the Class One railroads, during the year 1924, originated in the Southern District, exclusive of the Pocahontas Region, 23,700,740 tons of the commodities which are classed under

the general description of clay, gravel, sand and stone; that this tonnage was exceeded only by that of the products of the forests and by bituminous coal.

At page 320 of the record the witness Doss testified in substance that the total movement of these commodities over the Atlantic Coast Line in 1922 was 1,825,702 tons, which was 11.1 per cent. of the total tonnage handled by that road that year; that in 1923 it handled 3,047,292 tons, which was 15.2 per cent. of the total tonnage handled; that in 1924 it handled 3,750,195 tons, which was 18.1 per cent. of the total tonnage handled; that for the first ten months of 1925 it handled 4,452,519 tons, which was 22 per cent. of the total tonnage handled during those ten months; that the total revenue accruing on this 1925 tonnage was $4,074,316.02, an average of 91.5 cents per ton; that the tonnage on these commodities exceeded by more than 1,300,000 tons the tonnage of the next ranking commodity, while the revenue ranked fifth in the list; that from the standpoint of both tonnage and revenue, this traffic is of very great importance to the Atlantic Coast Line. The Commission made corresponding findings in its first report (R. 28).

The witness Doss on the next hearing (R. 625-6) brought this tonnage down to additional years, saying in substance that for the first eight months of 1928 the Coast Line handled 2,572,417 tons of these commodities, representing 18.6 per cent. of the total tonnage; that during the same period of 1927 it handled 3,517,513 tons, representing 22.7 per cent. of the total tonnage; that the revenue on the tonnage handled for the first eight months of 1928 approximated $2,100,000, and for the first eight months of 1927, $3,220,000; that the revenue on these commodities represented approximately 6.5 per cent. of that carrier's total freight revenues.

The Interstate Commission in its second report of December 9, 1929 (R. 100), found that during the four months period ended April 30, 1928, 1289 shipments of commodities moved exclusively over the line of the Southern Railway between points in Georgia and that that line participated in the joint line movement of 3111 shipments between Georgia points. The Georgia, Southern & Florida Railway originated and delivered 124 shipments and participated in the joint line movements of 583 shipments between Georgia points. During the same period the entire Southern Railway system originated and delivered 12,817 and participated in the joint line movement of 14,977. The Commission stated that these figures indicate a substantial joint line movement of this traffic. The Commission then states that, if the rates fixed by the Commission in Docket No. 17517 had been applied to the 2342 carloads which originated in Georgia on the Southern Railway, including shipments received from the Gainesville & Northwestern Railroad at Gainesville, Georgia, during the four months ended August 31, 1928, the revenue would have been $12,000 greater than that produced by the application of the Georgia scale, adding that "this is equivalent to $36,000 computed on an annual basis."

The Commission found that the Seaboard Airline during the year 1927 handled 5,213,183 tons of these materials, which was equivalent to 25.5 per cent. of its total tonnage for that period and that during the five months ended May 31, 1928, it handled 14,892 tons of slag from Alabama producing points to points in Georgia. The application of the Georgia scale to this movement would have produced $617 less revenue.

During the six months ended June 30, 1928, 23,096 tons of sand and gravel moved from Alabama producing points to Georgia destinations, mostly from Montgomery. The application of the Georgia scale to this movement would have produced $2,511 less revenue, or a decrease of 7.7 per cent. During the

months of May, June, July and August, 1928, the period immediately succeeding the date when the Georgia scale became effective, 50,687 tons of these commodities, originated at points in Georgia on the Seaboard Airline, and moved to destinations in Georgia. The charges were $7,307 less than they wuold have been if based on the Interstate scale; that was equivalent to about $22,000 computed on an annual basis.

During the year 1927 the Georgia Railroad, Western Railway of Alabama, and Atlanta & West Point Railroad handled 507,753, 714,148, and 397,380 tons of these commodities, which constituted 17.03, 29.99 and 20.78 per cent. of the total tonnage handled by each respectively during that period.

The Georgia Railroad during the four months ended August 31, 1928, handled 100,515 tons of these commodities moving to Georgia points. The charges on those commodities were $9,148 less than would have accrued on the basis of the Interstate scale. That was equivalent to $27,500 computed on an annual basis.

The witness Doss, in his exhibit 57, showed the carriers' proposed scales and the Georgia Commission's scales applicable for single and joint line hauls on these commodities and the earnings in mills per ton per mile thereunder (R. 349), and he showed that for distances beyond 200 miles the earnings under the carriers' proposed single line scale are less than 7 mills, and beyond 240 miles under their proposed joint line scale the earnings are also less than 7 mills, and that he did not consider traffic very desirable if it pays less than 7 mills per ton per mile, especially for distances as short as 200 miles; and if the Georgia Commission's single and joint line scales were extended at the same rate of progression as was observed for distances beyond 260 miles, the rate at 500 miles would be $1.90 per ton, or 3.8 mills per ton per mile; at 800 miles the scale would be

$2.40 per ton, or 3 mills per ton per mile; and at 1,040 miles the scale would be $2.80 per ton, or 2.7 mills per ton per mile; and that under the Georgia Commission's scale the railroads' earnings would get down as low as 2.7 mills per ton per mile.

VALUES OF THE COMMODITIES

The Commission found in its first report (R. 19) as follows:

> "Summarizing the testimony of various witnesses upon this question it appears that the prevailing average range and the general average of prices in cents per net ton at shipping point approximate those shown below.

Commodity	Average range Cents	General average Cents
Sand	20 to 50	35
Clay gravel	25 to 45	35
Washed gravel	40 to 80	60
Crushed rock	105 to 165	135
Slag (crushed and screened)	As high as 135	75
Slag (bank run)	20 to —	—"

The Commission shows that sand at Montgomery is a by-product and often sells for less.

In its first report (R. 43) the Commission found the per ton mile earnings expressed in mills under the single line and joint line rates proposed by the carriers and that the Atlantic Coast Line represented that any traffic which pays less than 7 mills per ton mile, especially for distances as short as 200 miles, is not considered very desirable. This is amply supported by Mr. Doss' testimony, quoted above.

USES TO WHICH THE COMMODITIES INVOLVED ARE PLACED

At page 95 of the record the Commission found:

"The commodities under consideration are used chiefly in the building of highways and in concrete construction work. They are also used for railroad ballast."

The same report also shows that because of highway and structural development taking place in Georgia that State is increasing in importance as a market for these materials. The uses to which these commodities are placed add very greatly to the necessity of making the order statewide. Highway construction is likely to be carried on constantly and for many years throughout the State. Such work is by its very nature constantly moving. The progress of highway construction may well change the destinations for the same piece of construction from period to period. The use of these materials in concrete construction and in other structural work and in railroad ballast contributed to the same result. Added to this the Commission found that these products are produced at numerous points in Georgia and neighboring States. Appendix A (R. 63-66) shows the points of production of these commodities in Alabama, Georgia, Mississippi, South Carolina, Tennessee, Virginia and North Carolina. An order less than statewide as to these commodities would have been useless. In the trial of the case it was submitted upon the basis of the need of uniformity between all parts of the State. The question was submitted as a statewide proposition by all parties concerned. In the admissions of the need of uniformity there was no reservation of that uniformity to limited parts of the State of Georgia.

The schedule of rates fixed by the Interstate Commerce Commission in Docket 17517 were stated to be in effect, intrastate and interstate, in the States of Alabama, Tennessee, Kentucky, North Carolina and South Carolina in the petition of the complainants in opposition to the petition to reopen the general investigation (R. 239).

EXTENT OF THE INVESTIGATION BEFORE THE COMMISSION

Historically the controversy in this case began on the 14th of July, 1921, when the Georgia carriers submitted to the Georgia Public Service Commission a proposed scale of freight rates, including scales for these commodities (R. 600).

On November 26, 1923, the Georgia Public Service Commission submitted to the shippers and carriers testative scales of rates on gravel, sand, etc., with request for their views and criticisms (R. 600).

On February 25, 1925 (R. 2), the Georgia Public Service Commission issued its order in the revision of freight rates between points in Georgia on these commodities. This order prescribed a scale somewhat lower (5 to 10 %) than had been provided by the Georgia carriers for a single line application on washed gravel, crushed stone and slag.

On April 1, 1925, the revision of the Georgia intrastate rates became effective (R. 601).

On June 5, 1925, the Atlantic Coast Line Railroad Company and certain other Georgia lines requested the Commission to enter into an investigation of the effect of the Georgia Commission's rates (R. 188).

On August 25, 1925, the Interstate rates were revised by the carriers, through individual tariffs, making those interstate rates no lower than the Georgia intrastate rates under the order of February 25, 1925. Those revisions were protested by certain interstate shippers. The Interstate Commission declined to suspend the tariffs.

On October 5, 1925, the Interstate Commission, on motion of carriers, entered its order directing an investigation.

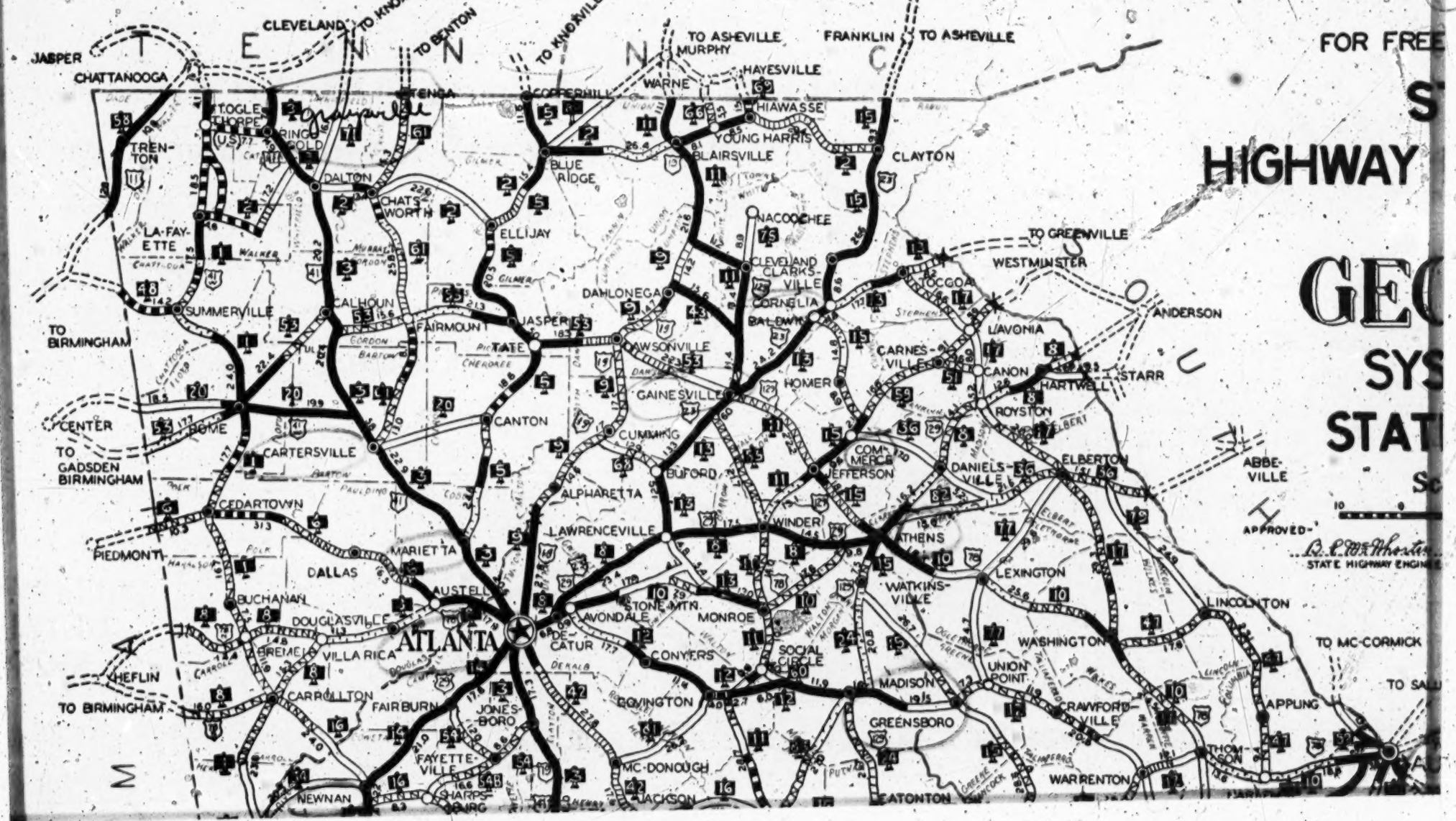
GEORGIA PUBLIC SERVICE COMMISSION

vs.

UNITED STATES

SAND

Map showing the points
commodities involved in this case, s
Report, Record 64.



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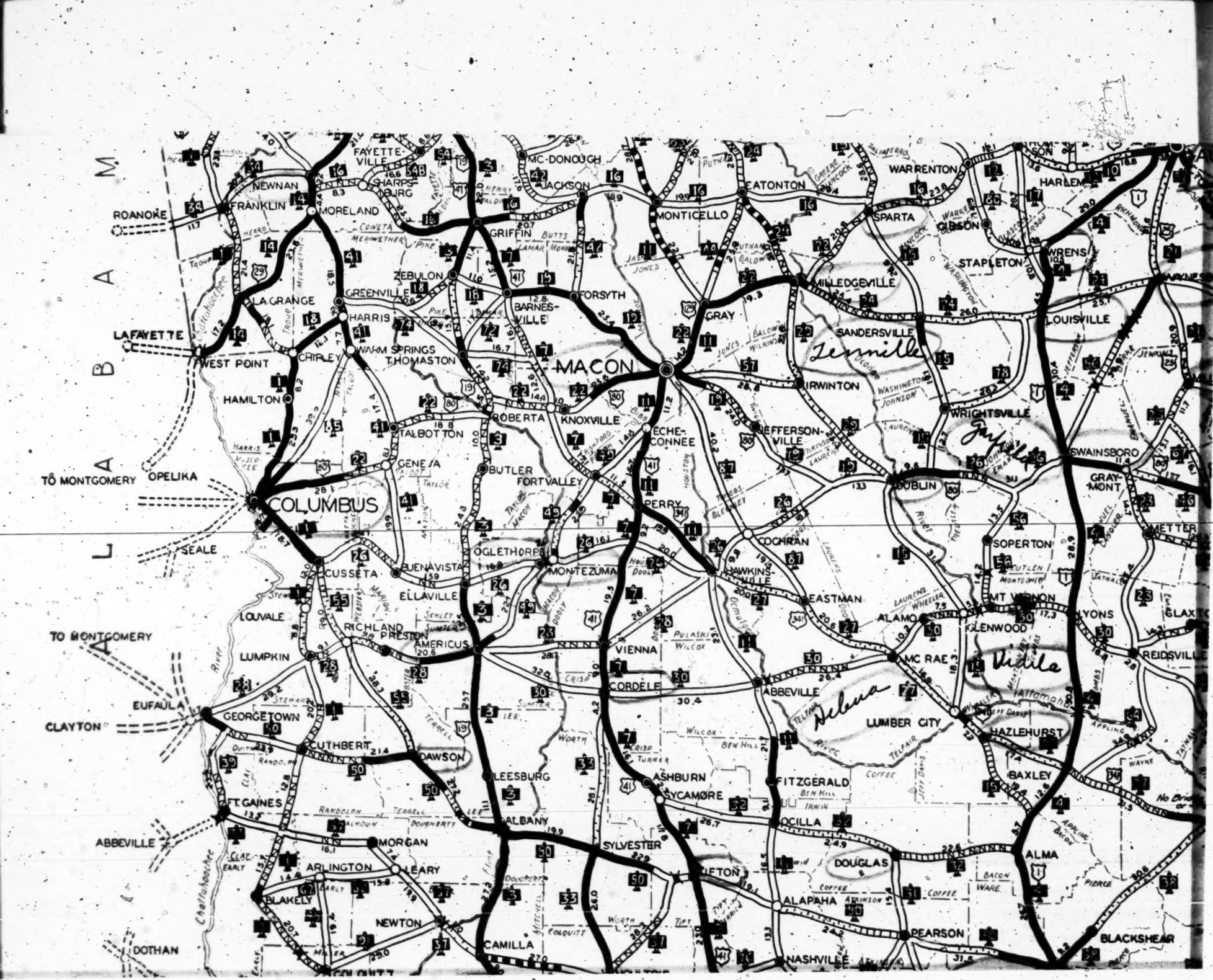
GEORGIA PUBLIC SERVICE COMMISSION

vs.

UNITED STATES

SAND AND GRAVEL CASE.

Map showing the points in Georgia producing commodities involved in this case, as found in Commission's Report, Record 64.


MACON
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NEWNAN
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SHARPSBURG
MC-DONOUGH
JACKSON
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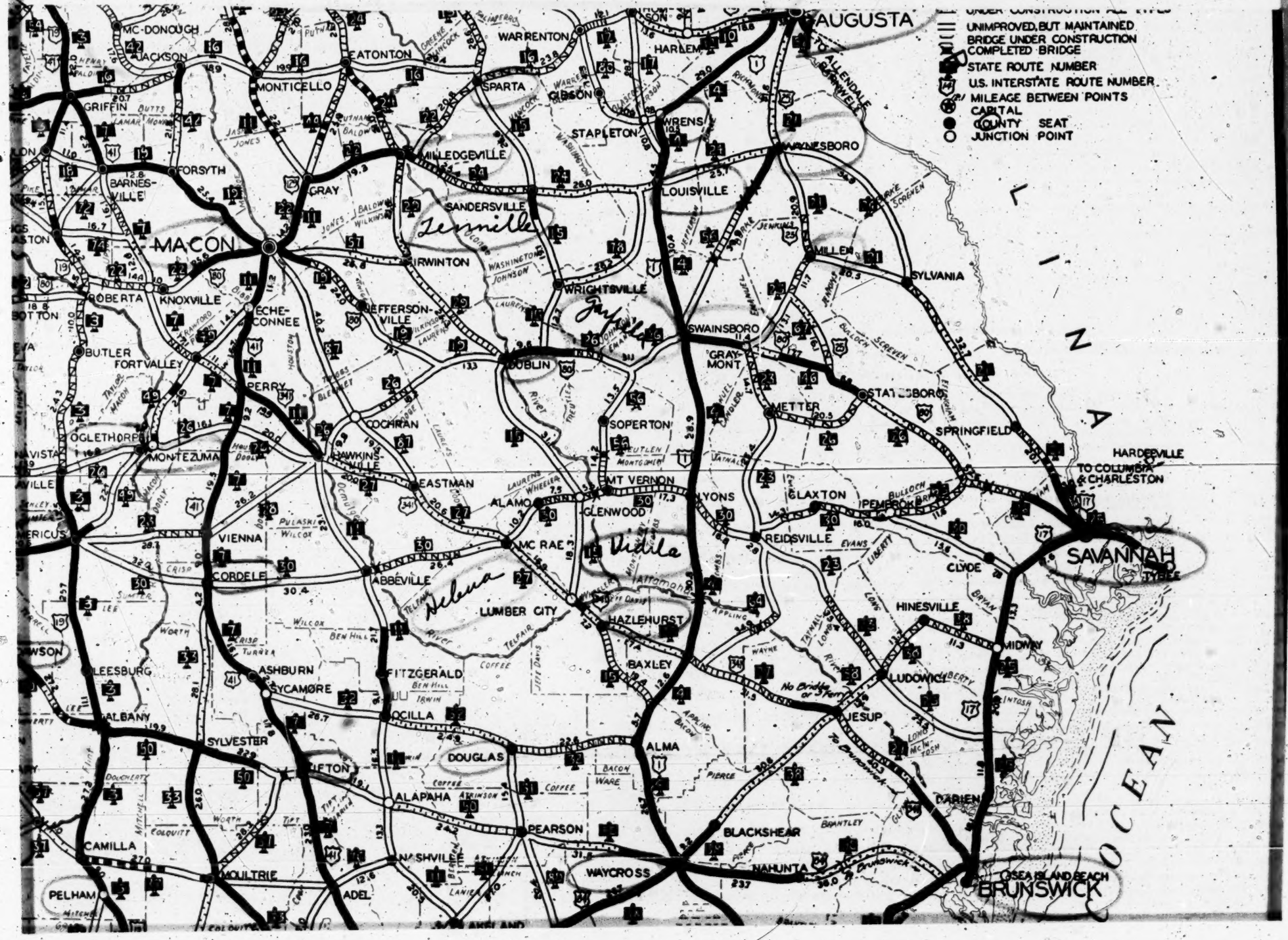
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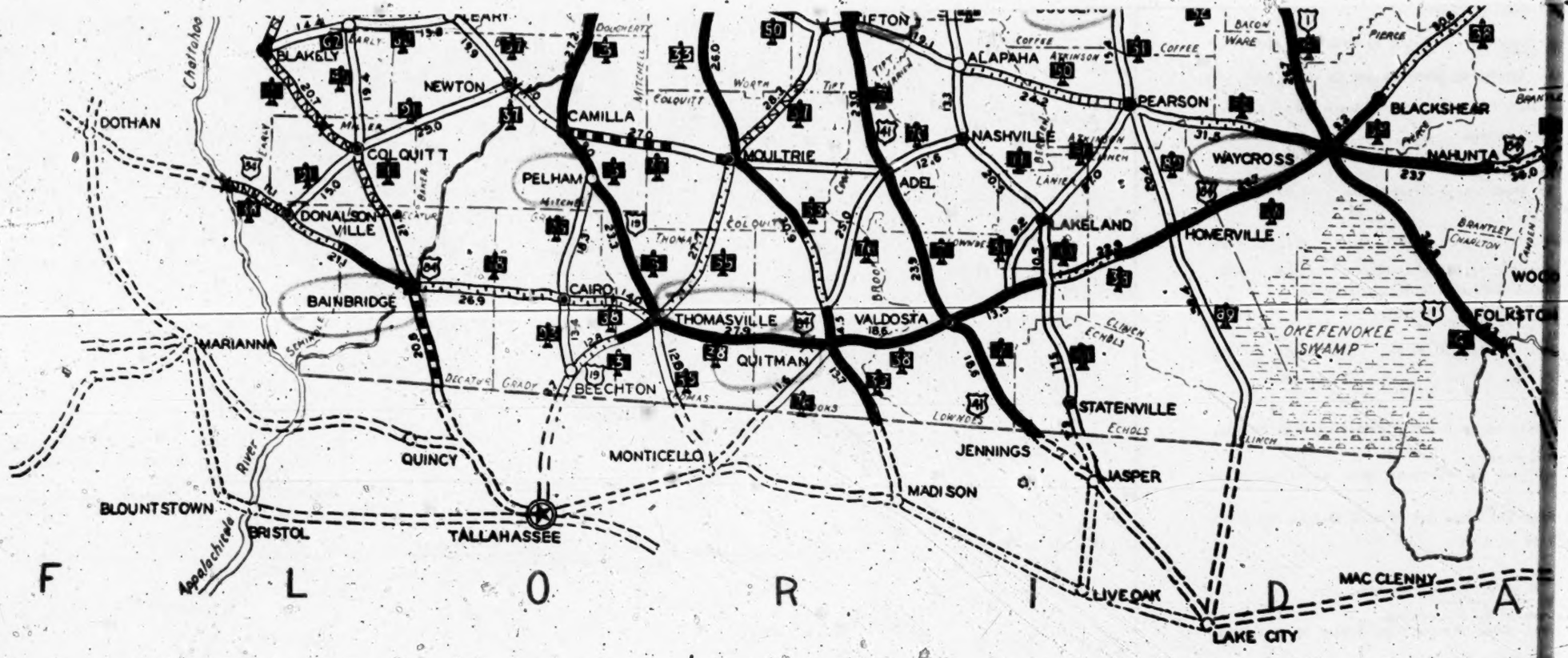
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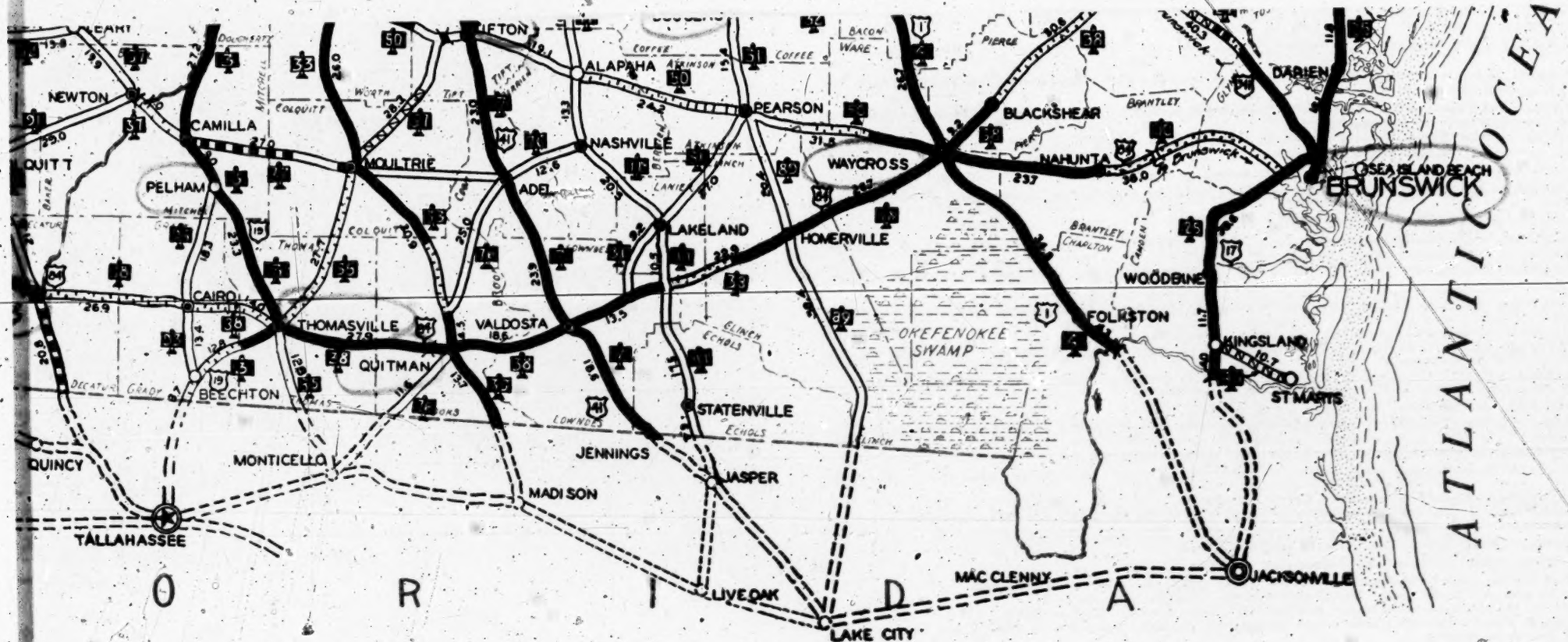
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GEORGIA PUBLIC SERVICE COMMISSION

vs.

UNITED STATES

Points of destination
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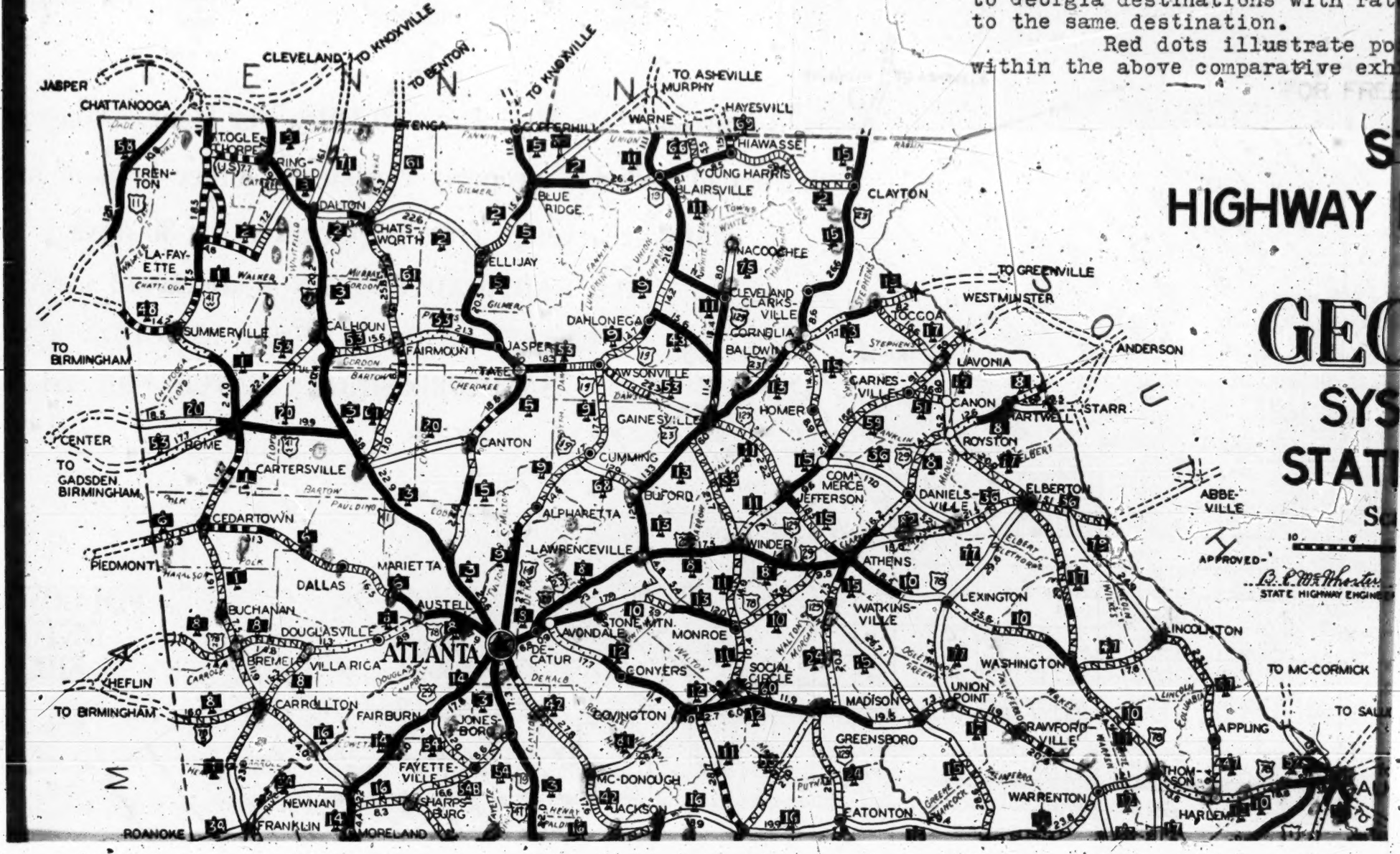

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GEORGIA PUBLIC SERVICE COMMISSION

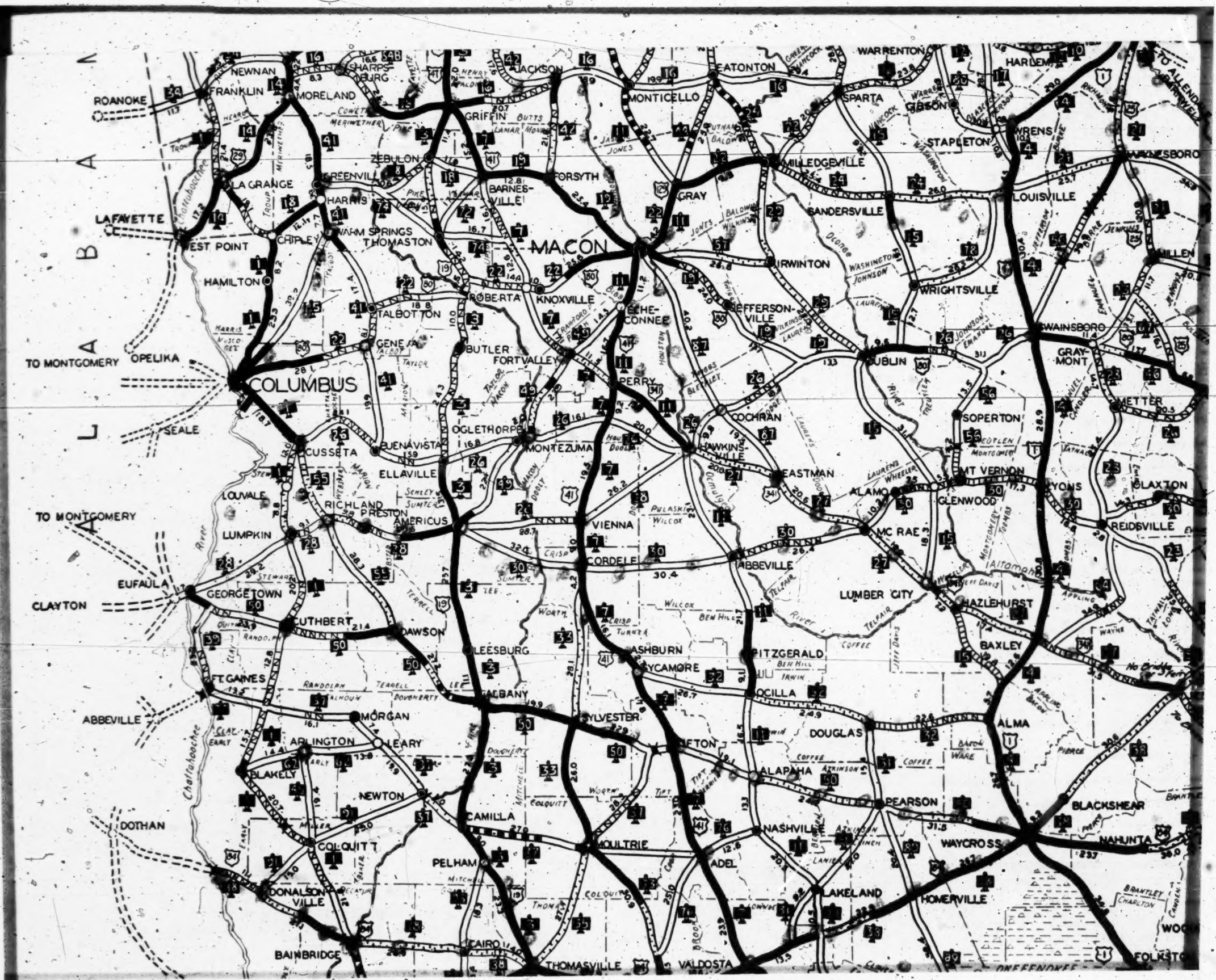
vs.

UNITED STATES

SAND AND GRAVEL CASE.

Points of destination within the State of Georgia considered by Interstate Commerce Commission in its Docket No. 17517 used in comparing rates from without the State of Georgia to Georgia destinations with rates from Georgia shipping points to the same destination.

Red dots illustrate points of destination included within the above comparative exhibits.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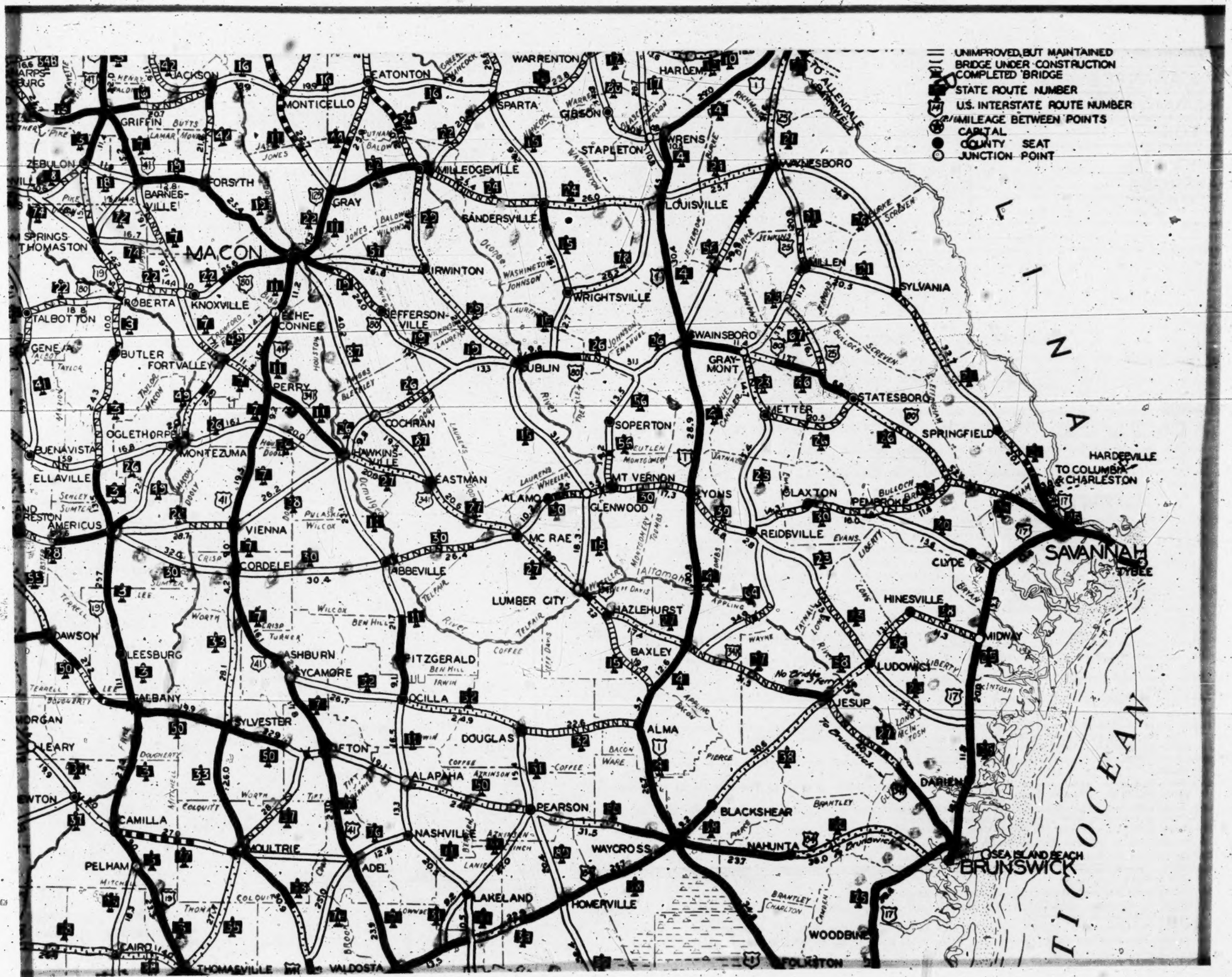
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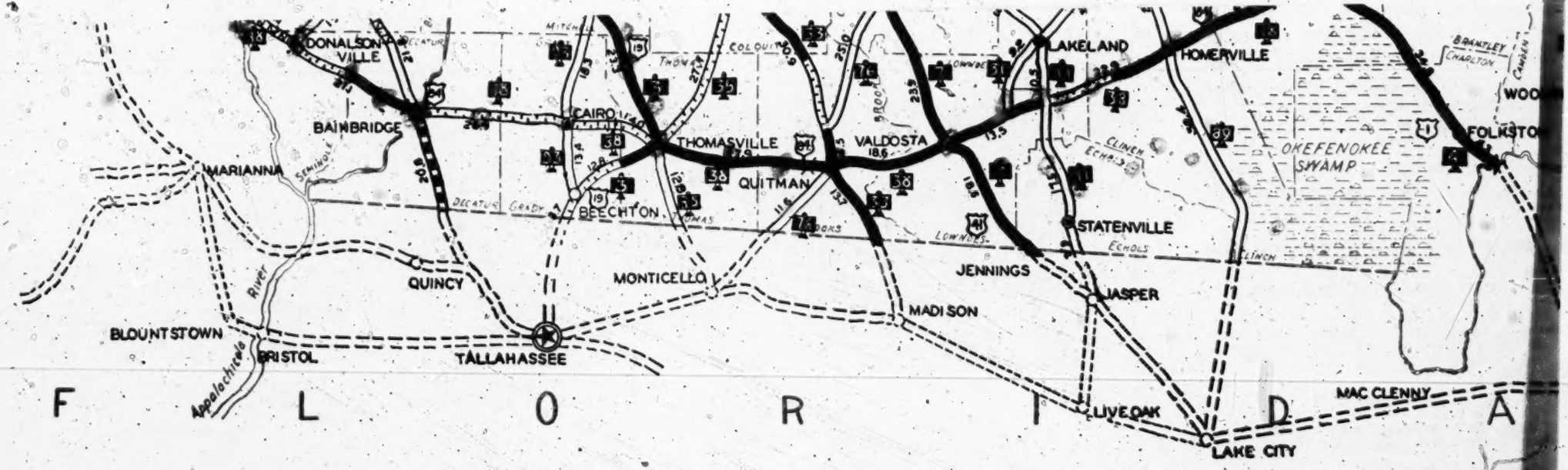
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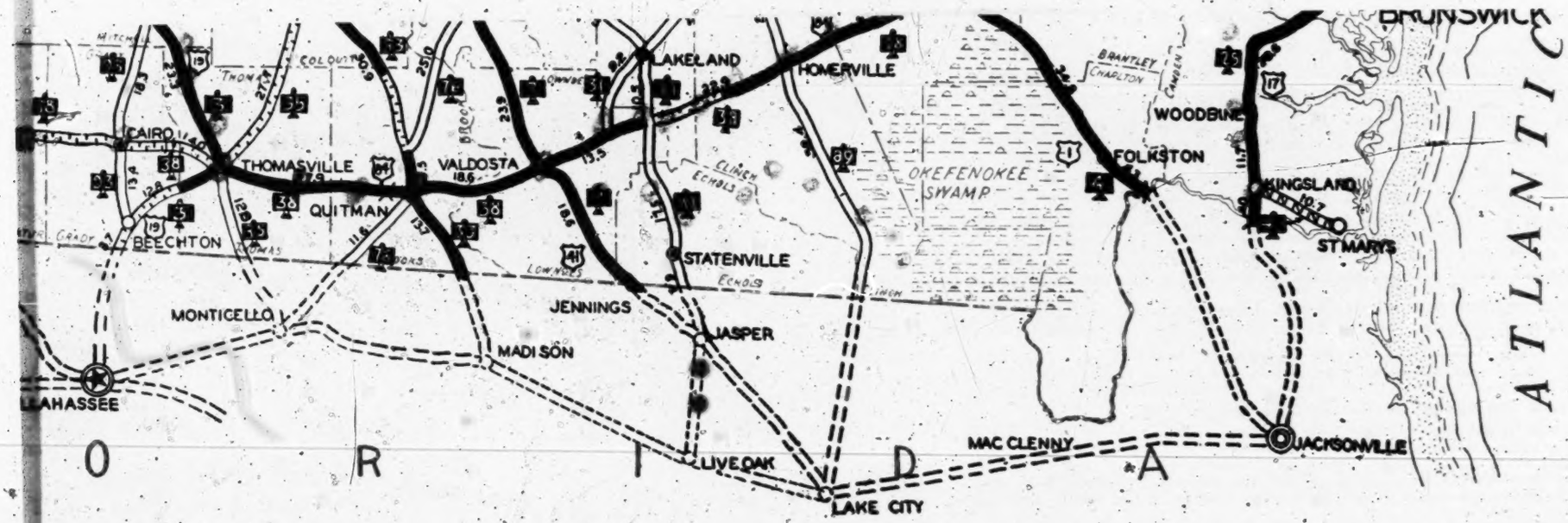
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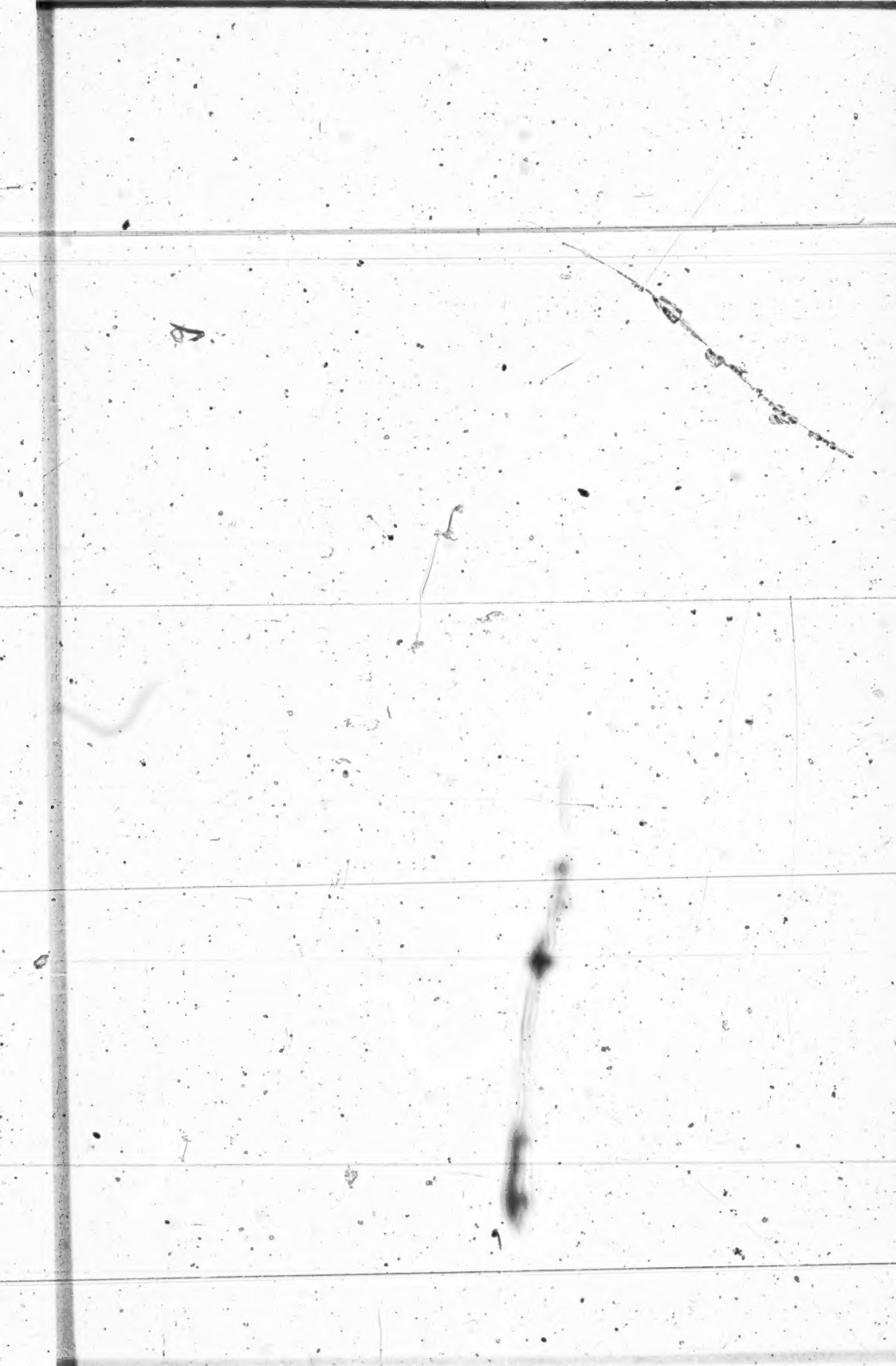

Thereafter, on December 2, 1925, the Roquemore Gravel Company and Dixie Sand & Gravel Company of Chattanooga filed complaints with the Interstate Commission attacking the Georgia rates as discriminatory against interstate commerce and against places and persons and traffic (R. 186).

The Commission's first report was rendered on January 21, 1927 (R. 12).

The Georgia Commission entered its second order dated the 13th of March, 1928, effective May 1, 1928. That order changed the rates which the Georgia Commission had fixed by its order of February 25, 1925, but did not harmonize with the rates which had been fixed by the Interstate Commission by its order of February 21, 1927 (R. 221).

The Interstate Commission on petition entered its order of the 4th day of June, 1928 (R. 240), reopening the situation. The proceeding was reopened solely for the purpose of finding whether or not the intrastate rates and minimum weights required by the Georgia Commission would cause any undue or unreasonable advantage, preference or prejudice between persons and localities in intrastate commerce, on the one hand, and interstate commerce, on the other, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce.

We thus see that the Commission ordered an investigation in October, 1925, and made its first report on February 21, 1927 (R. 12); that petition was filed with the Georgia Commission by the carriers, seeking to have the Georgia rates conform to the ones prescribed by the Interstate Commission on the 21st day of February, 1927. The Georgia Commission made its order on March 13, 1928. The Interstate Commission reopened the matter on the 4th day of June, 1928, and made its second report and order on December 9, 1929 (R. 88).

The hearings of testimony began in the original case on February 15, 1926 (R. 251), and continued for several days. Many witnesses were examined and a great many exhibits were filed. The court found that the hearing was undoubtedly full within the requirements of the statutes (R. 164).

In the reopened case a great deal of testimony was again given, beginning November 26, 1928 (R. 612). Complaint was made that the whole subject matter was not reopened for the purpose of contesting anew the question of the reasonableness of the rates which had been fixed in the 1927 order, and that because it was not so reopened a full hearing was not given within the meaning of section 13 (4) of the Act.

The Court held (R. 164-5):

> "We think, however, that such a hearing was here afforded. A full hearing was undoubtedly given prior to the order of Jan. 21, 1927. The identical State rates were not then in existence, but all the questions they raise were in existence and were investigated. New interstate rates were in that very proceeding established as reasonable, and the opinion expressed that as no transportation difference existed, the State rates ought to conform in order to escape future discrimination, but no positive order of conformity was then issued, in order that the State Commission might work the State rates out for itself. This left the proceeding in a manner uncompleted, and certainly proper to be reopened after the State rates were made. Ordinarily, nothing would be then left for examination except whether the new State rates did so conform to the new interstate rates as to escape discrimination. It was found that they did not, and conformity was ordered on a review of the whole record. While the hearing, which is to be considered a single one, lasted for years, we cannot say the evidence taken in any part of it had become stale. If the Georgia Commission had any definite proof of altered conditions, it should have been concretely offered. We discover no

abuse of procedure in reaching the order of Dec. 9, 1929, in the evidence now before us."

The evidence adduced on these hearings showed the locations of many producing points outside of the State of Georgia and in the State of Georgia; it showed the rates from producing points in the State of Georgia and out of the State of Georgia to destinations in the State of Georgia; it showed the mileage between the competitive destinations interstate and intrastate. For instance, Exhibit 100-B contained 48 sheets and showed such shipments to 46 points in Georgia, which were widely scattered throughout the State and fairly representative of the whole situation (R. 623).

The Interstate Commission took certain exhibits introduced by the carriers, showing interstate rates from numerous representative shipping points to representative destinations in Georgia, based on the 17517 scales, and "rates from representative Georgia origins to the same points, which are on the basis of the Georgia Commission's scale; and the amounts by which the Georgia rates differ from the 17517 basis."

The Georgia Commission's scale there referred to is the one of March 13, 1928. The Commission corrected that data and then set it out at page 97. There are 21 illustrations of intrastate rates compared with an equal number of interstate rates, the destination in each case being Georgia. This shows that the Georgia Commission's rates, as compared with the Interstate Commission's rates under scale 17517, are from 5 to 25 cents per ton lower than the Interstate scale, except in one instance when the Georgia scale was 5 cents per ton higher. The Commission declared those places to be "representative destinations in Georgia." The record shows in detail the statewide nature of the investigation. See page 55 hereof. That there was keen competition is admitted both as to commodities and markets; the nature of the commodities and their uses were proved; the

need of uniformity of rates on these commodities was proved and admitted; the low values of the commodities and the vast amounts of them which were being hauled were also proved, and the changing places of delivery follow from the very nature of the traffic.

This finding, supported by the record, would clearly indicate that throughout the State of Georgia there was a discrimination worked in favor of the intrastate shipper as against the interstate shipper, and this although the Georgia Commission admitted that there should be uniformity of rates in these commodities throughout the southern territory, and the declared purpose of the Georgia Commission, of the carriers, of the shippers, and of the Interstate Commerce Commission was to produce a uniformity of rates on these commodities throughout the southern territory.

PART TWO

BRIEF OF THE LAW

POWER OF THE COMMISSION

There can be no doubt about the power of Congress to authorize the Interstate Commerce Commission to establish intrastate rates in order to remove an unjust discrimination against Interstate Commerce.

> "In the exercise of this power, the Congress has given to the Commission authority not only to remove an undue prejudice as between persons or localities, but to establish a statewide level of intrastate rates when this is found to be necessary to accomplish the purpose of the statute."
>
> Florida vs. United States, 282 U.S. 194.

There is, of course, a "dovetail relation" between the provisions of Section 13 (4) (Appendix No. 2) and Section 15a of of the Act; and

> "As intrastate rates and the income from them must play a most important part in maintaining such a system, the effective operation of the Act requires that intrastate traffic should pay 'a fair proportionate share' of the cost of maintenance. And if there is interference with the accomplishment of the purpose of the Congress because of a disparity of intrastate rates as compared with interstate rates, the Commission is authorized to end the disparity by directly removing it."
>
> Florida vs. United States, Ib.

It is recognized that there must be basic or essential findings by the Commission to support the Commission's order. We have pointed out at some length many of the findings made by the Commission, both intermediary and final, and we have undertaken to point out the circumstances in which the hearing was had and to show that there was a common purpose on the part of all parties to the record to find a uniform scale of rates on the commodities here involved, applicable to interstate and intrastate alike in southern territory; and that this was done under admissions of the parties that the circumstances throughout the territory here involved "are sufficiently similar to warrant a uniform rate level on these commodities." We also contend that aside from the admissions, the findings by the Commission based on proper evidence show that the Georgia scale of rates, prescribed by the order of that Commission on the 13th day of March, 1928, worked unlawful discrimination against persons and places and against interstate commerce within the condemnation of Sections 3 and 13 of the Act, as found by the Commission.

We will first discuss the points made by the appellants in the District Court in defense of the said order of the Georgia Commission. We contend that these points are consistent with the admission of the need of uniformity of rates and that the contest between the two Commissions was as to whether the uniformity admitted by all to be needed to remove the discrimination should be accomplished by the adoption of the rate scale provided by one or the other Commission. We make the same contention as to the points made in defense of the Georgia Commission's order in the hearing before the Interstate Commerce Commission.

In its order of March 13, 1928, the Georgia Commission states (R. 222):

> "We are in accord with the views of the Interstate Commerce Commission that the intrastate rates should not cause

undue discrimination against interstate commerce; neither should interstate rates result in undue discrimination against intrastate commerce, and with this end in view, it is the purpose of this Commission to prescribe such rates as will permit of free movement and competition, both inter and intrastate."

This statement, when taken in connection with the statements of the Georgia Commission and the findings of the Interstate Commission heretofore pointed out as to the need of uniformity, appears to be a declaration on the part of the Georgia Commission that its plan of removing this discrimination should be accepted over the plan prescribed by the Interstate Commission.

Of course, when the two Commissions come into conflict over the relation between two kinds of rates as a relation, it is the Interstate Commission which is supreme.

> "The power to deal with the relation between the two kinds of rates as a relation, lies exclusively with Congress. It is manifest that the State cannot fix the relation of the carriers' interstate and intrastate charges, without directly interfering with the former, unless it simply follows the standard set by the Federal authorities."
>
> Shreveport Case, 234 U.S. 354.
>
> Dayton-Goose Creek Ry. vs. United States, 263 U.S. 456, 477, 478.

We further submit that the statements above quoted from the Georgia Commission's order are to be construed as admissions that the differences between the scale of rates prescribed by the Interstate Commission and by itself are sufficient to produce unlawful discrimination of the kind condemned by Sections 3 and 13 of the Act and which the Interstate Commission has the power to remove.

The Georgia Commission's statements in effect claim that the difference between the scale of rates prescribed in its order

of March 13, 1928, and in the Commission's order under 17517, January 21, 1927, constituted a discrimination against the Georgia traffic, and the Interstate Commission claims that this difference constituted a discrimination against the scale of rates which it had found to be reasonable in its report and order in 17517, January 21, 1927. There is no conflict of evidence which we discover in the record, and if there be any, it has been resolved by the fact-finding body, the Interstate Commission. The Interstate Commission has made its report, its findings and its orders. Of course, discrimination is a matter of fact, as this court has frequently decided.

> Note: Virginian Ry. vs. United States, 272; U.S. 658; Tagg Bros. & Moorhead vs. United States, 280 U.S. 420; Pennsylvania Ry. Co. vs. United States, 236 U.S. 351, 361.

In dealing with unjust discrimination as between persons and localities in relation to interstate commerce, we accept the statement that:

> "In dealing with unjust discrimination as between persons and localities in relation to interstate commerce, the question is one of the relation of rates to each other."

and also that:

> "In considering the authority of the Commission to enter the State field and to change a scale of intrastate rates in the interest of the carrier's revenue, the question is that of the relation of rates to income. The raising of rates does not necessarily increase revenue."
>
> Florida vs. United States, 282 U.S. 194.

POINTS MADE BY THE APPELLANTS IN THE DISTRICT COURT

These points are set out at page 5 hereof and at R. 162-3.

A Full Hearing Was Had

We have stated the facts as to the reopening of the petition at page 10 hereof under the title "The Petition of Carriers to the Georgia Commission" and at page 32 under the title "Extent of Investigation before the Commission." The claim that there was not a full hearing is based upon the fact that the Interstate Commission in reopening this case, by its order of the 4th of June, 1928, "reopened the said proceeding for further hearing on the sole question of whether or not the rates and minimum weights required by the Georgia Public Service Commission to be maintained by said respondent carriers on intrastate shipments" of the commodities here involved

> "in relation to the interstate rates and minimum weights prescribed in its report and order of January 21, 1927, in said No. 17517, causes or will cause any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate commerce or foreign commerce, on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce" (R. 614).

The appellants apparently desired to reopen the case to retry the question as to whether the rates fixed in proceeding 17517 were themselves reasonable. The trial on that issue had been long. A vast deal of evidence had been received. There is no denial that that hearing was full. It was followed by a petition by the carriers to the Georgia Commission. The Georgia Commission considered that petition and issued its order of March 13, 1928 (R. 220), which did not undertake to remove, but rather increased the discrimination. The Interstate Commission then, on motion of the carriers, reopened the case, as has been shown. The court found that none of the appellants

offered any definite proof of altered conditions (R. 165) in the rate situation since the Commission's report of January 21, 1927. The Commission itself replied to this contention as follows (R. 93):

> "The scope of the further hearing was properly limited to the question indicated. If the contention made on behalf of the Georgia Commission in this regard were sound, then our efforts to secure co-operative action in situations such as here presented instead of bringing about that result, could be made the instrument of burdening this commission with endless investigations covering the same subject matter and would result in litigation being prolonged indefinitely. The contention is without merit."

The rates prescribed are very low. The nature of the commodities is such that the rates change very slowly. The purpose of all parties to the contest before the Commission was to make uniformity of rates throughout the southern territory. The Commission's rates, as we have seen, were in effect in neighboring states. In the presence of the finding of the Commission on this subject, above quoted, and of the action of the lower court thereon, and in the absence of any specific statement of changed conditions by any of the appellants, we submit that the Interstate Commission was right in holding that this contention was "without merit," and that the District Court was correct in sustaining that holding.

SECOND POINT MADE BY APPELLANTS IN THE COURT BELOW

The court below found that the second point made by the appellants was (R. 164):

> "That the order did not stop with prescribing a maximum for interstate rates, but took over from State author-

ity the general function of intrastate rate-making in these commodities for the future."

This contention is based upon the fact that the order of the Commission of December 9, 1929 (R. 115), required the establishment of intrastate rates "which shall not be lower, distance considered, than those *contemporaneously* applicable to the interstate transportation of the same commodities, * * * not exceeding the rates set forth in the Appendix to this report and heretofore found and prescribed as reasonable in No. 17517 for the interstate transportation of said commodities."

The same point was made in the first hearing and was discussed by the court at Record 165. The contention turned upon the words "contemporaneously applicable" or "contemporaneously maintained" by the carriers in interstate commerce. It was contended by appellants that the word "contemporaneously" related not to the rates in effect by the carriers at the time of the effective date of the order, but to such rates as might be made by the carriers from time to time after the date of the order, thereby moving upwards or downwards intrastate rates for future application without the full hearing contemplated by Section 13 (4) of the Interstate Commerce Act.

The court below in its first opinion held (R. 165-6):

> "Whether the minimum is lawfully prescribed we all think depends on whether the order means by 'contemporaneously' the rates now applicable and now maintained by the railroads, which we think would be a certain and lawfully fixed minimum, or whether it means the rates that may at any time in the future be applicable or maintained by the railroads in interstate commerce. In the latter meaning we think the order would be unlawful because should in the future any of the interstate rates be altered, either by the railroad or by the Commission itself

on the usual proceedings only, a change in the existing State rates would ipso facto result. * * * A majority of this Court are of the opinion that the present order means only to establish as the minimum the interstate rates actually in force at its date. The writer thinks it means to operate automatically in the future whenever interstate rates may be altered, and, that thus intended, it is unlawful. On the ground, however, that it might mean either thing and should, if possible, be so construed as to be lawful, I acquiesce in sustaining it."

In the second order the court said (R. 169):

"The evidence leads us to no different conclusion. We adhere to what was said in the previous opinion."

In considering the meaning of the word "contemporaneously" as used in this connection it must be remembered that the first order of the Commission, which was entered on January 21, 1927, fixed rates for *interstate* transportation of the commodities here involved. The Commission hoped and expected that the Georgia Commission would reconstruct the intrastate rate scale so as to remove the discrimination worked thereby against the scales fixed by the Interstate Commission in the aforementioned order of January 21, 1927 (R. 59, 74). The interstate rates under that order went into effect and were in effect at the time the Commission considered the Georgia intrastate rate situation and on the date of its order of December 9, 1929.

The table of comparisons hereinbefore set out (page 12), taken from page 94 of the record, which is a part of the opinion in the second hearing, compared rates previously prescribed by the Commission in its docket No. 17517 with the Georgia Commission's rates fixed by that Commission's order of March 13, 1928.

It would seem clear, therefore, that the rates referred to as those contemporaneously in effect in interstate commerce

meant those which were filed with the Commission under the order of the Commission entered on January 21, 1927, in pursuance of the Commission's order of that date in Docket No. 17517. The court below (R. 165-6) evidently adopted this view in finding that "the present order means only to establish as the minimum the interstate rates actually in force at its date."

The word "contemporaneously" is a relative one. It means "at the same time;" but, as was said in Mitchell Coal & Coke Co. vs Pennsylvania R. R. Co., 181 Fed. 403, at 411, "at the same time with what?" The court in that case said: "A term is evidently implied which must be looked for in the context and in the subject matter of the statute." The court was considering the expression "contemporaneous service" as used in Section 2 of the Interstate Commerce Act.

The order fixed its own standard and that standard was (R. 115):

> "The rates set forth in the Appendix to this report and heretofore found and prescribed as reasonable in No. 17517 for the interstate transportation of said commodities in straight or mixed carloads."

We thus relate these words to the standard of rates fixed by the Commission for interstate transportation in No. 17517.

In the Fourth Section Order entered by the Commission in this case, copy of which is attached to this brief as Appendix No. 1, it was provided that the Fourth Section rates "shall not exceed the contemporaneous rates on sand and gravel constructed on the bases prescribed in said report; and shall in no case exceed the lowest available combination." This order permits the carriers, instead of publishing specific routing between points of origin and destination, to publish rules which

would govern the subject, as was allowed by the Commission in Brick and Clay Products, 113 I.C.C. 380, at 382.

Under Section 6 of the Act, every carrier is required to file schedules showing its rates and fares, and under sub-paragraph 3 of this section it is provided that:

> "No change shall be made in the rates, fares and charges or joint rates, fares and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except upon thirty days notice to the Commission and to the public as aforesaid, which shall plainly state the changes proposed to be made in the schedules then in force and the time when the changed rates, fares or charges will go into effect."

When the Commission's order became effective in No. 17517, the carriers filed their schedule expressing those rates.

The court below, in discussing the necessity for certainty in rate-making, said (R. 169):

> "As previously held, a maximum and minimum were undertaken to be fixed by the order of December 9, 1929. The maximum, identical with that previously fixed for interstate commerce in 122 I.C.C. 133, is a scale based on distances, higher for joint-line than for single-line hauls, and is accepted as sufficiently certain and practical. Under it the carriers had on December 9, 1929, established a system of rates between points in Georgia and points in other states which were prescribed as the intrastate minimum. These rates are embraced in several tariffs filed with the Commission and in evidence. They consist of hundreds of point-to-point rates between named places in Georgia and in other States. Then for all points not thus specially named the scale fixed by the Commission as a maximum is established as the rate. It is asserted, and we assume it to be true, that the vast majority of these point-to-point rates are mere applications of the scale

joint or single-line, as the case might be, to the distances involved. So far, therefore, the actual rates are nothing but the maximum scale."

It is claimed that there had been certain departures from the interstate rates. The Commission held that the departures from the maximum scale are all accounted for by application of the order entered under Section 4, or are errors to be corrected (R. 170). There is no contention but that the rates which the carriers purposed putting into effect in Georgia at the time of the first hearing before the District Court and which were actually in effect at the time of the second hearing, had been ascertained under the Commission's order and were upon the basis of those fixed by the Commission in Docket 17517, which were already in effect.

Tariffs had been prepared and filed, expressing the interstate rates, and after the order of December 9, 1929, tariffs were prepared and filed setting up the intrastate rates in Georgia.

There was no claim that the intrastate rates there stated were not in conformity with the interstate rates contemporaneously in effect, distance considered. The point made by appellants in this connection appears to be that, if those interstate rates are changed, the intrastate rates automatically change. The appellees deny that construction, but state that the appellants are in no position to make the point for the reason, if for no other, that no condition has arisen justifying the point; that no effort has been made or is being made to have the Georgia intrastate rates changed with changed interstate rates, and until such effort has been made, there is no occasion for making the point and none for passing upon it. The actual application of the order of December 9, 1929, as above stated, shows that there was no indefiniteness in it, either in the understanding of the carriers or of the Commission. The rates intrastate

in Georgia had been expressed in absolutely definite terms in the tariffs which were filed and accepted by the Interstate Commission before the effective date of the Interstate Commission's order of December 9, 1929.

Carriers cannot change their rates, once filed, without the sanction of the Commission [Act to Regulate Commerce, §15 (7) and §6 (3)]. It is not to be presumed that either Commission will permit the filing of tariffs, effective intrastate, without complying with the requirements of the law. The great probability is that if the Commission should fix different rates in the future on these commodities interstate, those rates would then be made lawful intrastate by filings made by the carriers with the Georgia Commission and accepted by that Commission. If the State Commission should not accept those filings and neither the carriers nor the Interstate Commission accepted that action of the State Commission, then the remedies under Section 13 of the Act would be open alike to the Interstate Commission and to the carriers.

No unlawful application of the order has been made and none is threatened. The presumption is that no unlawful act will be done by either the Commission or the carriers. Until there has been some actual act of unlawfulness threatened the presumption is that both Commissions will stay within the law.

THE MINIMUM RATES PRESCRIBED ARE DEFINITE AND CERTAIN

The third point made by the appellants, as stated by the District Court, is "that the minimum sought to be prescribed is indefinite and uncertain" (R. 164).

The court below discussed this at page 169. The order (R. 115) directs the carriers "to establish, on or before March 3,

1930, and thereafter to maintain and apply to the intrastate transportation" of the commodities mentioned,

> "in carloads, between points in the State of Georgia, rates which shall not be lower, distance considered, than those contemporaneously applicable to the interstate transportation of the same commodities, in straight or mixed carloads, between points in the State of Georgia, and from points in other States in Southern territory, except Florida, to points in the State of Georgia, not exceeding the rates set forth in the Appendix to this report and heretofore found and prescribed as reasonable in No. 17517 for the interstate transportation of said commodities in straight or mixed carloads."

It must be borne in mind that the Commission fixed the basis of computing distances for the application of the scale of rates and that the shortest routes are to be used for rate-making purposes over which carload traffic can be moved without transfer of lading. The Commission states that it meant by this provision that the shortest single line route over which carload traffic could be moved, without transfer of lading, should be used in connection with the single line scale, and the shortest joint line route over which carload traffic could be moved, without transfer of lading, should be used in connection with joint line scale (R. 107). When there is only one line between origin and destination the ascertaining of the minimum intrastate rate requires no equation. When there are two or more lines between origin and destination of different rate-making qualities the ascertainment of the minimum intrastate rate over the less favored line requires the application of the Fourth Section Order coupled with the arbitrary allowed, if any, to the so-called weak line. This arbitrary may or may not have been taken in full or at all; but, if it had been taken either in full or in part this was reflected in the rate schedules of file and contemporaneously in effect in interstate commerce on the date of the order here involved.

The Georgia Commission cannot go below these minima rates. It may go above them.

This leaves the Interstate Commission's order not only capable of definite application, but the standard had been reduced to definiteness by the interstate schedules already of file with the Interstate Commission.

The court below found that (R. 169):

> "It is asserted, and we assume it to be true, that the vast majority of these point-to-point rates are mere applications of the scale, joint or single-line as the case may be, to the distances involved. So far, therefore, the actual rates are nothing but the maximum scale."

The Commission by its Fourth Section Order, which is set out in the Appendix hereto, has directed that all routes, not circuitous beyond a fixed per cent. (with certain other limitations therein fixed) might take the same rate as the lowest over any route, joint or single line, by which the carload freight might move without transfer of lading. There is nothing unusual about relief from the long and short haul rules either under Section Four of the Interstate Commerce Act or under the rules of the Georgia Commission, nor is there anything unusual about the method of ascertaining mileage. The Interstate Commission had approved that method in General Southeastern Class Rate Case, 100 I.C.C. 656; 109 I.C.C. 312; 113 I.C.C. 200; and in the General Cement Case, 132 I.C.C. 427.

The Commission states that:

> "The Fourth Section relief sought and granted was based on various considerations beside circuity. For instance, we have authorized joint line differentials in these proceedings in consideration of the extra costs incurred by respondents in interchanging traffic from one to the other. It would have been impossible for joint line carriers to

have met competition of single line routes and obtained these differentials without Fourth Section relief."

The Georgia Commission in its order of March 13, 1928, in the eighth paragraph thereof (R. 226), recognized the necessity for relief akin to Fourth Section relief. In that paragraph the Georgia Commission ordered:

> "That when, by the use of the schedule rates authorized in this Order, rates are established between competitive points by a carrier or carriers, whose lines form the lowest rate-making route, the carrier or carriers forming the longer distance, or higher rate-making route, are permitted to meet such competition, and to charge higher rates at intermediate points, but in no instance shall rates be charged higher than for the single or joint line scale of rates authorized herein, for the actual distance, via the route making the lowest rate to, from, or between such intermediate points."

The Georgia Commission thus, in effect, adopts both the method of ascertaining mileage fixed by the Commission and the method of ascertaining the rate to be applied between competitive points where the distance over the competing lines is not the same. This order of the Georgia Commission is so framed and its rate schedules are so stated as to permit joint line routes to meet the single line routes even when the carriers are not in the same class. It is only in these circumstances that the minimum rate comes into effect, and when it is necessary to ascertain the minimum rate, the bases for its ascertainment are set out by the Interstate Commission as plainly as they are set out by the Georgia Commission. Both scales are based on distance; the Interstate scale makes a higher rate for joint line than for single line hauls; the Georgia Commission's scale makes a higher rate for Georgia joint transportation between a Class "A" and a Class "B" road (R. 224, 226, column 3).

The Georgia Commission and certain interests complained to the Interstate Commission that (R. 108):

> "Carriers are maintaining numerous interstate rates on this traffic which are below the level of the 17517 scales."

The Commission replied that (R. 108-9):

> "An examination of this data discloses that with few exceptions the instances given are simply where different routes are, under the authorized fourth-section relief above referred to, meeting at competitive points the rates set by the rate-making route, and applying at intermediate points the authorized scale basis. It readily can be understood that if this relief were not accorded, the rate-making route would secure all the traffic between competitive points * * *. In applying within Georgia the scale prescribed by the Georgia Commission here in question, the carriers have the right, if they see fit, to meet at competitive points the rates maintained by the rate-making route. The argument here advanced that our findings and order require the maintenance over all routes between two given points of the rate established via the rate-making route is without merit."

We have seen that the Georgia Commission has not only the right to permit the carriers to meet at competitive points the rate maintained by the rate-making route, but that it has so provided for it as to its own schedules under the order of March 13, 1928.

The Commission proceeds as follows (R. 109):

> "The evidence in this case shows that with comparatively few exceptions, considering the extent of the territory covered, the carriers have checked in over the rate-making routes throughout the territory considered in the original proceedings interstate rates which are on the basis of the 17517 standard-line scales. Carriers explain that the instances where such rates are off the approved basis are the result of error which will be corrected."

The Court below took the same view of it and said (R. 170):

> "We see nothing to hinder the Georgia State Commission from causing the establishment of intrastate rates which will follow the same principles that were applied in fixing interstate rates where competition justifies departure from the maximum scale. Had the Commission prescribed a fixed intrastate scale, the State Commission, or the carriers, would have been bound to establish it forthwith. When instead a maximum and minimum are fixed, as is allowed by Section 13 (4), the fixing of the exact rates within these limits is to be done by the State Commission on its usual procedure. If the result in any instance is thought contrary to the order of the Interstate Commerce Commission, the latter may be applied to for further or clarifying order in the premises."

It would seem that this would, both as a matter of law and fact, put an end to the third contention made by the appellants in the court below.

FOURTH POINT STATED BY THE COURT BELOW

The fourth point stated by the court below, as urged by the appellants, is that as to rates above 200 miles the interstate rates are arbitrary and unreasonable, and themselves discriminate against the shorter hauls and other commerce.

In the second and final hearing the court stated that this point was abandoned (R. 169). It was, in any event, a matter of fact for determination by the Commission.

This contention was based on the difference in gradation of the rates to distances. Of course, this was to be controlled by the facts, and the finding of the Commission was conclusive.

THE FINDINGS OF THE COMMISSION, INDEPENDENT OF ADMISSIONS, FULLY MEET THE REQUIREMENTS OF SECTION 13 OF THE ACT TO REGULATE COMMERCE

We will summarize some of these findings:

The Commission found that there was keen competition not only between producers but between the commodities (R. 16, 95, 102). It found and stated the values of these commodities and showed that they were very low (R. 19). It found that there were numerous points of production of these commodities throughout the southern territory (R. 19). It stated in Appendix "A" to its original report (R. 63) the shipping or producing points of these commodities in Alabama, Georgia, South Carolina, Tennessee and North Carolina, each of which States border Georgia; in Alabama there were 43 producing points; in Georgia 38; in South Carolina 21; in Tennessee 28; and in North Carolina 13. It showed the quantity of movements of these commodities in southern territory over Class One roads (R. 19, 28, 41, 100, 101). It found the amount of the revenue arising to certain of the carriers from this traffic and the volume of the traffic (R. 28, 41, 100, 101). It showed the effect of this traffic to certain of these carriers if the Georgia rates had been in effect (R. 41, 100, 101). It showed the earnings per ton mile, which were low (R. 43). It found that there should be a uniform rate level upon the commodities over standard lines within the southern territory except the Florida peninsula (R. 51). It found that joint line arbitraries were proper (R. 52). It also found that in the price to the consumer the cost of transportation is a heavy factor (R. 53). It found that there was no transportation reason for maintenance of a different basis of rates intrastate on these commodities within Georgia than those which the Commission found to be reasonable for interstate transportation (R. 59, 91, 110).

It then found that the intrastate rates in Georgia to the extent that they are lower, distance considered, than the interstate rates contemporaneously applicable to transportation of the same commodities between points in the State of Georgia, etc., not exceeding the rates set forth in the appendix to the report, resulted and will result in undue preference, advantage, etc., and discrimination against interstate commerce. It found the amount of the difference between the two rates per ton. A difference of ten cents per ton is a substantial part of the cost price of the commodities which rank from 35 cents to $1.35 per ton (R. 19).

None of these findings is disputed. The findings show not only a difference in rate but an undue discrimination, and they show that this substantial disparity results in real discrimination; that the extent of the discrimination has been found by the Commission's order, and the Commission has made the means of removing that discrimination. The order thus complies with every requirement of the statutes and the decisions thereunder.

Note: Arkansas Commission vs. Chicago, etc., R. R. Co., 274 U.S. 597, 599.

STATEWIDE SCOPE OF THE INTERSTATE COMMISSION'S ORDER

The order is statewide and applies to all intrastate traffic in the commodities mentioned between points in Georgia. It is based upon undue preference and advantage of shippers and receivers of freight in intrastate commerce in the State of Georgia and undue prejudice to shippers and receivers of freight in interstate commerce in the State of Georgia and from points in other States in southern territory, except Florida, to points in Georgia, and in unjust discrimination against inter-

state commerce. The investigation made by the Commission covered the entire State of Georgia. It showed not only the 38 producing points in Georgia, but those in Alabama, South Carolina, Tennessee, and North Carolina. It then showed the effect of the rates prescribed by the Georgia Commission by its order of March 13, 1928, as compared with the Interstate rates fixed by the order of that Commission of January 21, 1927. This investigation was statewide. A highway map of the State of Georgia will be filed with this brief, showing the points of destination as to which comparisons of rates interstate and intrastate were shown in the evidence before the Commission in its last investigation leading up to its order of December 9, 1929. The Commission states (R. 96):

> "Exhibits were introduced by respondents showing the interstate rates from numerous representative shipping points to representative destinations in Georgia, which rates are on the basis of the 17517 scales; rates from representative Georgia origins to the same points, which are on the basis of the Georgia Commission scale; and the amounts by which the said Georgia rates differ from the 17517 basis."

Comparisons of the kind shown in the quotation just above set out were made to 350 points of destination in Georgia. We contend that these comparisons demonstrated that the discriminatory effect of the Georgia intrastate rates against interstate commerce and as to persons and places, existed and exists throughout the entire State of Georgia.

A glance at the map above mentioned will give visual proof of the statewide scope of the investigation. (The destinations on the above mentioned map are not taken from any one exhibit; they are taken from all the applicable exhibits—a Georgia highway map was used in making some of the exhibits before the Commission.)

We are filing with this brief another map which shows the location of the 38 points of origin of these commodities in the State of Georgia. Those points are encircled in red. It will be seen that they are widely scattered over the State and that in view of the keen competition between commodities and also between markets, and in order to remove the discrimination condemned by the statute it is necessary that the Interstate order be made statewide.

This investigation and the nature of the commodities would seem to fully meet the requirements of the Wisconsin Case, 257 U.S. 563, 580. In that case the court, referring to the Shreveport Case, 234 U.S. 342, and the Illinois Central Case, 245 U.S. 493, stated:

> "There, as here, the report of the Commission showed discrimination against persons and localities in border points and the orders were extended to include all rates or fares from all points in the State to border points."

The court then called attention to the fact that the order in the Wisconsin case was not so restricted, but included fares between all interior points, although neither may be near the border and the fares between them may not work a discrimination against interstate travelers at all.

In the case at bar the report of the Commission shows discrimination against persons and localities throughout the entire State of Georgia. Here there is competition between two systems of rates. The necessity for uniformity on these rates throughout the southern territory was found by the Commission. This need of uniformity is not as to a part of the southern territory, but as to all of that territory. The investigation, as we have shown, includes so many points in the State of Georgia so widely scattered that we may fairly say that it includes all of it. The use of the commodities in highway build-

ing, railroad ballast, concrete construction and other structural work, will require that they be transported to any, or all, or possibly every, destination in Georgia, not only in the building of highways but in the repairing of them and the placing of ballast and keeping the ballast in repair and the making of the structures referred to. Work of this kind may be carried on in the large cities or in the waste spaces of the State. To illustrate: Concrete highways, of course, pass through thinly populated sections; railroads pass over like places; and heavy constructions, such as dams, bridges, causeways, and culverts are frequently made in the most out of the way places where there is no population at all. Those constructions use these commodities.

The producing points for some or all of these commodities are constantly changing, additions are being made to them, there are innumerable deposits of sand, gravel and stone scattered not only over the State of Georgia, but over the neighboring States, and new points of origin are being frequently added and, of course, the points of destination are constantly changing. The result is that no rate system can be effective as to these commodities which is less than statewide. The intent of all parties was uniformity in the rate structure. This was in recognition of the facts here stated and of the further fact that the rate system put in by the Interstate Commission was already in effect in the neighboring states and that the producers in those states were in direct competition with producers in Georgia (R. 95), and further because it was urged upon the Commission that it should consider not only the effect that a failure to condemn the Georgia intrastate rates would have upon the revenue of the carriers but also other results which would likely follow such action, and that the final result would be that the general basis prescribed by the Interstate Commission, after an exhaustive investigation and much labor, would be effectively

whittled away and uniformity defeated by the separate actions of the other neighboring states (R. 105).

Besides the unlawful discrimination worked against localities, persons and traffic, there was ample evidence to show discrimination against general interstate commerce, as we will hereinafter point out.

The Georgia Commission's order of March 13, 1928, was statewide. It was confessedly made with the view of disagreeing with the Interstate rates which had been made by the Commission. It declared that the gradation of the scale prescribed by the Interstate Commission would work great injury and damages to shippers and carriers on Georgia intrastate traffic, "and for that reason we are prescribing a revised scale in order that all interests may be preserved" (R. 79).

The points which the Interstate Commission stated were those constituting the chief defense of the Georgia Commission, and which have been heretofore set out, show clearly that the Georgia Commission accepted the proposition that any order entered should be statewide (R. 104).

The points made in the District Court and before the Commission in defense of the Georgia Commission's order, and which we have heretofore set out, show no complaint against the Interstate Commission's order because it is statewide.

The Interstate Commission in this case made the basic or essential findings required to support the Commission's order.

DISCUSSION OF THE POINTS MADE BY THE APPELLANTS BEFORE THE INTERSTATE COMMISSION IN DEFENSE OF THE GEORGIA COMMISSION'S SCALE OF RATES

There were four of these points, the last of which was abandoned as we have pointed out. The first two are arguments as

to why there should not be joint line differentials. The third point is that "it is not now the policy of the Georgia Commission to authorize joint line differentials." As a matter of fact, three of the four points revolve around the propriety of joint line differentials in this traffic. The fourth point went to the proposition that the scale prescribed by the Georgia Commission is reasonable and is better gradated than are the Interstate Commission's rates. In no one of these points is there raised any question of power. These points, when taken in connection with the admissions of the need of uniformity of rates, are simply asserting that uniformity should be accomplished by the method contemplated by the Georgia Commission rather than that contemplated by the Interstate Commission. Uniformity was to be between interstate and intrastate rates on these commodities. It was admitted that this uniformity should exist throughout the entire southern territory. It would be impossible to give that subject over to the Georgia Commission, for it involved the dealing with things quite beyond the jurisdiction of that Commission, both as to interstate rates and as to the territory beyond the Georgia lines. This brings us back to the proposition that there was an admitted need of uniformity between the State and Interstate rates to avoid the discrimination prohibited by law; that the Interstate Commission thought that this uniformity should be brought about by one level of rates; the State Commission thought it should be brought about by another. It is the Interstate Commission which must prevail in this circumstance.

STATEWIDE SCOPE OF THE ORDER FROM A REVENUE STANDPOINT

We have pointed out the Interstate Commission's findings as to the quantity of these commodities moving. (See page 26 hereof and R. 28, 29, 101.) These findings show that the traf-

fic, both from the standpoint of tonnage and revenue, is of great importance to the various railroads involved.

In 1924 the tonnage constituted 18.1 per cent. of the Atlantic Coast Line Railroad Company's total tonnage. For the first ten months of 1925 that road handled 4,452,519 tons, which produced a revenue of $4,074,316.

The tonnage in these commodities handled by the southern carriers was exceeded only by that of the products of the forest and of bituminous coal (R. 17). The Commission found (R. 100) that during the four months period ended April 30, 1928, 1,289 cars of these commodities moved over the line of the Southern Railway between points in Georgia, and that that road participated in the joint line movement of 3,111 shipments between Georgia points.

The Georgia, Southern & Florida Railway originated and delivered 124 shipments and participated in the joint line movement of 583 shipments moving between Georgia points. During the same period the entire Southern Railway System originated and delivered 12,817 shipments and participated in the joint movement of 14,977 (R. 100).

It was computed that if the 17517 basis of rates had been applied to the carload traffic originating in Georgia on the Southern, including shipments received by that line from the Gainesville & Northwestern at Gainesville, Ga., during the four months period ended August 31, 1928, the road would have received $12,000 more revenue than was produced by the application of the Georgia scale. This is equivalent to $36,000 computed on an annual basis (R. 100).

As to the Seaboard Airline, the Commission found that in 1927 its tonnage in these commodities was 25.5 per cent, of its total tonnage for that year; that during the five months period

ended May 31, 1928, the Seaboard handled 14,892 tons of slag from Alabama producing points to points in Georgia; that those latter shipments were charged on the basis of the 17517 rates; and that the application of the Georgia scale to that tonnage would have produced $617 less revenue (R. 100).

The Commission found that during the six months period ended June 30, 1928, 23,096 tons of sand and gravel moved from Alabama producing points to Georgia destinations; that if the Georgia scale had been applied to that revenue, that tonnage would have produced 7.7 per cent. decrease, that is, $2,511; that during the months of May, June, July and August, 1928, a period immediately succeeding the date when the Georgia scale became effective, 50,687 tons of crushed stone, sand and gravel originated at producing points in Georgia on the Seaboard and moved to destinations in Georgia; that the charges collected were $7,307 less than they would have been on the basis of the 17517 scale, and that this was equivalent to $22,000 computed on an annual basis (R. 101).

The Commission found that the Georgia Railroad, Western Railway of Alabama, and the Atlanta & West Point handled very large tonnage, as has been hereinbefore set out, amounting to 17.03, 29.99 and 20.78 per cent. of the total tonnage of those roads, respectively, for the year 1927; that during the four months ended August 31, 1928, 100,515 tons of these commodities originated on the Georgia Railroad and moved to Georgia points; that the charges collected were $9,148 less than would have accrued on the basis of the 17517 scale, and that this was equivalent to approximately $27,000 computed on an annual basis (R. 101).

The Commission also found (R. 43) that the application of the Georgia scale shows that the ton mile earnings on this traffic are exceedingly low, and also found the percentage of the ton-

nage transported in these commodities to the total tonnage, and then the percentage of the revenue derived from this transportation to the total freight revenue. The disparity is very great (R. 28, 29).

The Commission thus made findings as to the quantity of the traffic, the value thereof, the rates thereon, the revenues derived therefrom, the rates per ton mile, the effect of transportation rates on markets, the locations of the producing points and the shipping points, the keenness of competition, the relation of the quantity of the traffic to total tonnage and of the revenue therefrom to total freight revenue and the transportation characteristics of the traffic; and it made many comparisons of rates intrastate with interstate, amply covering the State. It then made estimates of the effect on the revenue of some of the carriers in the operations of the two scales of rates. It found not only that a discrimination was worked by the Georgia scale of rates but that this existed to the extent that the Georgia rates are lower, distance considered, than the Interstate rates (the 17517 scale fixed by the Commission's order of January 21, 1927). These findings are to be taken in connection with the circumstances of the trial and the admission of the parties as to the need of uniformity of schedules; also in connection with the order of the Georgia Commission of March 13, 1928, and the purposes thereof as expressed by its terms.

We insist that the record shows a submission to the Commission on the basis of existing unlawful discrimination admitted by all parties; the Interstate Commission claiming that the discrimination was against interstate rates, the Georgia Commission claiming the discrimination was against intrastate business; and all admitting the need of uniformity of rates not only in Georgia but throughout the entire territory; and that the facts found are sufficient in and of themselves, independent of these admissions, to justify the order of the Commission; and that

when the facts thus found are taken in connection with those admissions and the issue submitted and the method of trial and the points raised in defense of the Georgia Commission's position, it makes it doubly sure that the Interstate Commission's order is lawful, amply sustained by findings, and that it should be sustained in its statewide scope because of the unlawful discrimination worked by the Georgia Commission's order of March 13, 1928, against persons, places, etc., and as well against Interstate Commerce.

We also claim that, apart from any admissions as to uniformity of conditions, the evidence before the Commission and the findings of the Commission, intermediate as well as final, justified the Interstate Commission in finding the discrimination and in removing it by the order which was entered.

We respectfully submit that the decree of the Court below should be affirmed.

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APPENDIX NO. 1

FOURTH SECTION ORDER

"*It is ordered*, That carriers defendant in Docket 17517 and cases consolidated therewith, *Rates on Chert, Clay, Sand and Gravel*, 122 I.C.C. 133, and other carriers parties to the above numbered applications which applications are hereby made a part hereof, be and they are hereby authorized to establish and maintain on the following commodities in carloads, viz: sand, gravel, crushed stone, slag, rubble stone, broken stone and chert over all lines or routes from any point of origin to any point of destination within the territory included within the scope of the proceedings in Docket 17517 and cases consolidated therewith, the lowest rates applicable on sand and gravel over any route between the same points constructed on the bases prescribed in the report in the said proceedings, which report is hereby referred to and made a part hereof, and to maintain higher rates from, to and between intermediate points: *Provided* that the rates of any of said commodities in carloads from, to and between the said intermediate points shall not exceed the contemporaneous rates on sand and gravel constructed on the bases prescribed in the said report and shall in no case exceed the lowest available combination; *and provided further*, that except as authorized in the next succeeding paragraph hereof the relief herein granted shall not apply (1) where the short line or route from any point of origin to any point of destination is 150 miles or less in length and the longer line or route between the same points is more than 70 cents circuitous; (2) where the short line or route exceeds 150 miles in length and the longer line or route is more than 50 per cent. circuitous, except that where the short line or route exceeds 150 miles and the longer line or route does not exceed 255 miles, the relief herein will apply to such longer line or route even though the said longer line or route is more than 50 per cent. circuitous.

It is further ordered, That in the event that carriers applicants herein desire to publish general rules showing rates and maximum distances for routing in accordance with the method and subject to the limitations authorized in *Brick and Clay Products in the South*, 113 I.C.C. 380, in lieu of the publication of specific routing between points of origin and destination, said carriers be, and they are hereby, authorized to observe the degrees of circuity which would result from the establishment of routes in the manner and upon the basis set forth in *Brick and Clay Products in the South*, supra."

APPENDIX NO. 2

SECTION 13 OF THE INTERSTATE COMMERCE ACT:

(1) That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters

complained of in such manner and by such means as it shall deem proper.

(2) Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(3) Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this

Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this Act.

(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.